(16)

Record No. 99-1848

In The Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

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Petition for Certiorari Filed: May 15, 2000
Certiorari Granted: September 26, 2000

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U.S. District Court
Northern District of West Virginia (Elkins)
CIVIL DOCKET FOR CASE #: 96-CV-106

Buckhannon Board, et al v. Filed: 10/28/96
WV Dept. of HHS, et al

Assigned to: Judge Frederick P. Stamp, Jr.
Demand: $0,000 Nature of Suit: 950
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 42:405 Fair Housing Act

[Parties and counsel omitted]

10/28/96	1	COMPLAINT filed; FILING FEE $ 120.00, RECEIPT # 29263 (Copy to Judge) (jer) [Entry date 10/29/96]
10/28/96	2	MOTION by plaintiff Buckhannon Board, plaintiff WV Residential Bd., plaintiff Daisy Layman, plaintiff Dorsey Pierce for Temporary Restraining Order. (copy to Judge) (jer) [Entry date 10/29/96]
10/28/96	3	MOTION by plaintiff Buckhannon Board, plaintiff WV Residential Bd., plaintiff Daisy Layman, plaintiff Dorsey Pierce for Preliminary Injunction. (copy to Judge) (jer) [Entry date 10/29/96]

10/28/96 4 NOTICE of Hearing on Motion for Temporary Restraining Order: Tuesday, October 29, 1996 at 1:30 p.m. before the Honorable Judge Robert Maxwell, United States District Courthouse, in Elkins, WV. (copy to Judge) (jer) [Entry date 10/29/96]

10/29/96 5 ORDERED this civil action be, and the same is hereby, transferred to the docket of the Honorable Frederick P. Stamp, Jr. (copies to counsel, all parties listed on the notice of hearing, Judge Stamp) (file sent to Clerk's Office at Wheeling) (signed by Judge Robert E. Maxwell) (jer) [Entry date 10/29/96]

10/29/96 -- CASE reassigned to Judge Frederick P. Stamp Jr. (jer) [Entry date 10/29/96]

10/30/96 6 ORDER, for Temporary Restraining Order (signed by Judge Frederick P. Stamp Jr.) (soa) [Entry date 11/01/96]

11/1/96 -- HEARING ON MOTION FOR TRO held in Wheeling. Proposed order of parties to be filed. (soa) [Entry date 11/01/96]

11/4/96 8 NOTICE of Hearing by Buckhannon Board, WV Residential Bd., Daisy Layman and Dorsey Pierce. (c to Judge) (mji) [Entry date 11/07/96]

11/4/96 9 AGREED ORDER Staying Enforcement Of Cease And Desist Order and Establishing

Briefing Schedule: Discovery deadline on 1/2/97 and Deadline for filing of all motions by 1/15/97. (signed by Judge Frederick P. Stamp Jr.) (c to Judge & counsel) (mji) [Entry date 11/07/96]

11/18/96 12 ANSWER to Complaint For Declaratory and Injunctive Relief And Monetary Damages by State Fire Marshal and Walter Smittle. (Copy to Judge) (mji) [Entry date 11/18/96]

11/18/96 13 MOTION with memorandum in support by WV Dept. of HHS, Gretchen O. Lewis, Off. Health Facility, Nancy Tyler, Sandra L. Daubman and Gaston Caperton to Dismiss. (c to Judge) (mji) [Entry date 11/18/96]

11/20/96 14 MOTION with memorandum in support by St Bd Prof. Nurses and Laura S. Rhodes for Summary Judgment In Part, and to Dismiss In Part. (c to Judge) (mji) [Entry date 11/21/96]

11/22/96 15 MOTION Joining In Other defendants' Motion to Dismiss by State Fire Marshal and Waler Smittle. (copy to Judge) (mji) [Entry date 11/25/96]

12/16/96 20 MEMORANDUM by St Bd Prof. Nurses and Laura S. Rhodes in support of [14-2] motion to Dismiss In Part, [13-1] motion to Dismiss, Response To Plas' Opposition To The Dfts'

Motions To Dismiss. (c to Judge) (mji) [Entry date 12/19/96]

12/30/96 26 MOTION by plaintiff Dorsey Pierce, plaintiff Daisy Layman, plaintiff WV Residential Bd., plaintiff Buckhannon Board to Amend [1-1] complaint. (copy to Judge) [complaint attached] (mji) [Entry date 01/06/97]

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1/13/97 27 RESPONSE by WV Dept. of HHS and Gaston Caperton to [26-1] motion to Amend [1-1] complaint. (c to Judge) (mji) [Entry date 01/16/97]

1/13/97 28 OBJECTIONS by St Bd Prof. Nurses and Laura S. Rhodes to [26-1] motion to Amend [1-1] complaint. (c to Judge) (mji) [Entry date 01/16/97]

1/13/97 29 MOTION by defendant State Fire Marshal for Renewed Motion Of Summary Judgment In Part, and to Dismiss In Part. (copy to Judge) (mji) [Entry date 01/16/97] [Edit date 02/20/98]

1/13/97 29 OBJECTIONS by State Fire Marshal to [26-1] pla's motion to Amend [1-1] complaint. (c to Judge) (mji) [Entry date 01/16/97]

1/23/97 30 MEMORANDUM by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board in opposition to The Dfts' Objections To

The [28-1] motion To Amend The Complaint. (c to Judge) (mji) [Entry date 01/23/97]

2/7/97 31 MEMORANDUM OPINION AND ORDER granting [26-1] motion to Amend [1-1] complaint. (signed by Judge Frederick P. Stamp Jr.) (c to Judge & counsel) (mji) [Entry date 02/07/97]

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2/7/97 32 AMENDED COMPLAINT by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board, (Answer due 2/27/97) amending [1-1] complaint against WV State Fire Comm., John Beaty II, Joseph J. Bostar III, Randy Breeden, James W. Fife, Francis A. Guffey II, Daniel Hess, Gregory Alan Lay, David L. Tolliver, Stephen C. McBee, Bill L. Spencer, Stallard Jr., J.D. Waggoner and Kenneth Morgan .(Copy to Judge) (mji) [Entry date 02/10/97]

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3/10/97 39 RESPONSE by Walter Smittle, State Fire Marshal, Sandra L. Daubman, Nancy Tyler, Off. Health Facility, Gretchen O. Lewis, WV Dept. of HHS, WV State Fire Comm., John Beaty II, Joseph J. Bostar III, Randy Breeden, James W. Fife, Francis A. Guffey II, Daniel Hess, Gregory Alan Lay, David L. Tolliver, Stephen C. McBee, Bill L. Spencer, Victor Jr., J.D. Waggoner and Kenneth Morgan to

Amended Complaint For Declaratory And Injunctive Relief And Monetary Damages. (Copy to Judge) (mji) [Entry date 03/11/97]

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12/12/97 44 STIPULATION OF DISMISSAL. (Copy to Judge) (mji) [Entry date 12/17/97]

12/31/97 45 MOTION with memorandum in support by State of WV, Gaston Caperton, Laura S. Rhodes, St Bd Prof. Nurses, Walter Smittle, State Fire Marshal, Sandra L. Daubman, Nancy Tyler, Off. Health Facility, Gretchen O. Lewis, WV Dept. of HHS, WV State Fire Comm., John Beaty II, Joseph J. Bostar III, Randy Breeden, James W. Fife, Francis A. Guffey II, Daniel Hess, Gregory Alan Lay, David L. Tolliver, Stephen C. McBee, Bill L. Spencer, Victor Stallard Jr., J.D. Waggoner and Kenneth Morgan for Summary Judgment. (c to Judge) (mji) [Entry date 01/05/98] [Edit date 01/05/98]

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1/2/98 46 STIPULATION: To The Following Documents To Be Used by this Court In Considering The Parties Cross-Motions for Summary Judgement... (Copy to Judge) (mji) [Entry date 01/05/98] [Edit date 01/05/98]

1/5/98 47 MOTION with memorandum in support by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board for Summary

Judgment w/four bound note books exhibits 1-13 containing the Stipulated documents. (c to Judge w/note books to be returned to the Clerk's office after trial) (mji) [Entry date 01/05/98]

1/27/98 53 MOTION w/attachments by Buckhannon Board, Dorsey Pierce, Daisy Layman, WV Residential Bd. for Summary Judgment - Revised referring to [47-1] motion for Summary Judgment. (copy to Judge) (rjs) [Entry date 01/27/98]

1/27/98 54 Revised MEMORANDUM by Buckhannon Board, Daisy Layman, Dorsey Pierce, WV Residential Bd. in support of [53-1] amended motion for Summary Judgment - Revised. (copy to Judge) (rjs) [Entry date 01/27/98]

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2/12/98 56 RESPONSE by State of WV, Gaston Caperton, Laura S. Rhodes, St Bd Prof. Nurses, Walter Smittle, WV State Fire Comm., John Beaty II, Joseph J. Bostar III, Randy Breeden, James W. Fife, Francis A. Guffey II, Daniel Hess, Gregory Alan Lay, David L. Tolliver, Stephen C. McBee, Bill L. Spencer, Victor Stallard Jr., J.D. Waggoner and Kenneth Morgan to [53-1] Plas' motion for Summary Judgment. (c to Judge) (mji) [Entry date 02/13/98]

2/13/98 57 RESPONSE by Plas Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board to Dfts' [47-1] motion for Summary

Judgment, [45-1] motion for Summary Judgment, [29-1] motion for Summary Judgment In Part, [14-1] motion for Summary In Part. (c to Judge) (mji) [Entry date 02/13/98]

2/19/98 58 MEMORANDUM OPINION AND ORDER granting in part and denying in part [13-1] Dfts WV Dept Of Health & Human Resources, Gretchen O. Lewis, Office of Health Facility Licensure And Certification, Nancy Tyler, Sandra L. Daubman And Gaston Caperton's motion to Dismiss, denying [14-1] Dfts WV State Board Of Examiners For Registered professional Nurses And Laura S. Rhodes' motion for Summary Judgment In Part And denying [14-2] motion to Dismiss In Part, And denying [29-2] Dfts WV Office Of The State Fire Marshal And Walter Smitttle's Renewed motion For Summary Judgment In Part And Motion To Dismiss. (signed by Judge Frederick P. Stamp Jr.) (c to Judge & counsel) [WSF-98-71] (mji) [Entry date 02/20/98]

3/3/98 59 MOTION by plaintiff Dorsey Pierce, plaintiff Daisy Layman, plaintiff WV Residential Bd. and plaintiff Buckhannon Board to Dismiss Pla Daisy Layman, by her next friend, Faye Byers. (copy to Judge) (mji) [Entry date 03/03/98]

3/3/98 60 MOTION by plaintiff Dorsey Pierce, plaintiff Daisy Layman, plaintiff WV Residential Bd. and plaintiff Buckhannon Board To Substitute Real Party In Interest. (copy to Judge) (mji) [Entry date 03/03/98]

3/3/98 61 ORDER granting Plas' [59-1] motion to Dismiss Daisy Layman By Her Next Friend Faye Byers And granting Plas' [60-1] Motion To Substitute Real Party In Interest. (signed by Judge Frederick P. Stamp Jr.) (c to Judge & counsel) (mji) [Entry date 03/04/98]

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3/4/98 62 STIPULATION: To the following facts to be used by this Court in all matters pending and all matters which may arise before a final order is entered. (Copy to Judge) (mji) [Entry date 03/04/98]

3/4/98 63 MOTION by defendant State of WV, defendant Gaston Caperton, defendant Laura S. Rhodes, defendant St Bd Prof. Nurses, defendant Walter Smittle, defendant WV State Fire Comm., defendant John Beaty II, defendant Joseph J. Bostar III, defendant Randy Breeden, defendant James W. Fife, defendant Francis A. Guffey II, defendant Daniel Hess, defendant Gregory Alan Lay, defendant David L. Tolliver, defendant Stephen C. McBee, defendant Bill L. Spencer, defendant Victor Stallard Jr., defendant J.D. Waggoner and defendant Kenneth Morgan to Stay. (copy to Judge w/Order) (mji) [Entry date 03/05/98] [Edit date 03/05/98]

3/11/98 -- MOTION by defendant State of WV, defendant Gaston Caperton, defendant Walter Smittle, defendant State Fire Marshal, defendant Sandra L. Daubman, defendant Nancy Tyler, defendant

Off. Health Facility, defendant Gretchen O. Lewis, defendant WV Dept. of HHS, defendant WV State Fire Comm., defendant John Beaty II, defendant Joseph J. Bostar III, defendant Randy Breeden, defendant James W. Fife, defendant Francis A. Guffey II, defendant Daniel Hess, defendant Gregory Alan Lay, defendant David L. Tolliver, defendant Stephen C. McBee, defendant Bill L. Spencer, defendant Victor Stallard Jr., defendant J.D. Waggoner, defendant Kenneth Morgan (copy to Judge) (mji) [Entry date 03/11/98]

3/11/98 64 MOTION by defendant State of WV, defendant Gaston Caperton, defendant Walter Smittle, defendant State Fire Marshal, defendant Sandra L. Daubman, defendant Nancy Tyler, defendant Off. Health Facility, defendant Gretchen O. Lewis, defendant WV Dept. of HHS, defendant WV State Fire Comm., defendant John Beaty II, defendant Joseph J. Bostar III, defendant Randy Breeden, defendant James W. Fife, defendant Francis A. Guffey II, defendant Daniel Hess, defendant Gregory Alan Lay, defendant David L. Tolliver, defendant Stephen C. McBee, defendant Bill L. Spencer, defendant Victor Stallard Jr., defendant J.D. Waggoner and defendant Kenneth Morgan for Richard M. Yurko and Amy M. Smith to Withdraw as Attorney, and to Substitute Attorney Charlene A. Vaughan and Chad M. Cardinal. (copy to Judge) (mji) [Entry date 03/11/98]

3/20/98 66 MEMORANDUM by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board in opposition to [63-1] Dfts' motion to Stay. (c to Judge) (mji) [Entry date 03/20/98]

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3/24/98 67 REPLY by WV Dept. of HHS to Pla's Opposition to [63-1] motion to Stay. (c to Judge) (mji) [Entry date 03/24/98]

4/22/98 68 MEMORANDUM OPINION AND ORDER denying [45-1] Dfts' motion for Summary Judgment As Moot, denying [47-1] Plas' motion for Summary Judgment As Moot, denying [53-1] Plas' Revised motion for Summary Judgment As Moot, denying [63-1] Dfts' Motion For Stay And Establishing Briefing Schedule. Motions with respect to the issue of mootness by 5/22/98... (signed by Judge Frederick P. Stamp Jr.) (c to Judge & counsel) [WSF-98-152] (mji) [Entry date 04/24/98] [Edit date 04/24/98]

5/15/98 69 MOTION with memorandum in support by Walter Smittle, State Fire Marshal to Dismiss. (c to Judge) (mji) [Entry date 05/15/98]

5/22/98 70 MOTION with memorandum in support by WV Dept. of HHS And Cecil Underwood to Dismiss and Renewed Motion For Summary Judgment. (c to Judge) (mji) [Entry date 05/26/98]

6/5/98 72 RENEWED MOTION by plaintiff Dorsey Pierce, plaintiff Daisy Layman, plaintiff WV

Residential Bd. and plaintiff Buckhannon Board for Summary Judgment. (copy to Judge) (mji) [Entry date 06/05/98]

6/5/98 73 RESPONSE by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board to [70-1] motion to Dismiss and [69-1] motion to Dismiss. (c to Judge) (mji) [Entry date 06/05/98]

6/5/98 73 MEMORANDUM by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board in support of Their Renewed [72-1] motion for Summary Judgment. (c to Judge) (mji) [Entry date 06/05/98]

6/5/98 74 MOTION with memorandum in support by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board for Attorneys' Fees. (c to Judge) (mji) [Entry date 06/05/98]

6/5/98 75 AFFIDAVIT by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board In Support Of [74-1] motion for Attorneys Fees And Expenses. (c to Judge) (mji) [Entry date 06/05/98]

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6/11/98 76 STIPULATION Of Dismissal: That Counts IV,V, and VI of the Amended Complaint relating to Dfts WV Dept of Health and Human Resources, Gretchen O. Lewis, And Office of Health Facility Licensure and Certification,

Nancy Tyler, Sandra L. Daubman, are dismissed without prejudice from this action. Also Counts IV,V, and VI are stricken from Plas' Amended Complaint. (Copy to Judge) (mji) [Entry date 06/12/98]

6/15/98 77 REPLY by WV Dept. of HHS to Pla's response to Dft's [70-1] motion to Dismiss. (c to Judge) (mji) [Entry date 06/15/98]

6/15/98 78 REPLY by Walter Smittle and State Fire Marshal to response to [69-1] Dfts' motion to Dismiss. (c to Judge) (mji) [Entry date 06/16/98]

6/18/98 79 RESPONSE by Walter Smittle and State Fire Marshal to [74-1] motion for Attorney Fees. (c to Judge) (mji) [Entry date 06/18/98]

6/19/98 80 RESPONSE by WV Dept. of HHS to Pla's [74-1] motion for Attorneys Fees. (c to Judge) (mji) [Entry date 06/19/98]

6/30/98 81 MEMORANDUM by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board Regarding [74-1] motion for Attorneys' Fees. (c to Judge) (mji) [Entry date 06/30/98]

1/29/99 83 MEMORANDUM OPINON and ORDER: Denying [74-1] motion for Attorneys' Fees; Denying [72-1] motion for Summary Judgment; Granting [70-1] motion to Dismiss; Denying [70-2] renewed motion for Summary Judgment; Granting [69-1] motion to Dismiss; and

Directing defs., Smittle, WV Office of State Fire Marshal, and WV State Fire Commission to submit memorandum by 2/16/99 to Show Cause shy they have not violated Rule 11; pltffs. to respond by 2/23/99. (signed by Judge Frederick P. Stamp Jr.) (copies to counsel, Judge) [WSF-99-23] (soa) [Entry date 01/29/99] [Edit date 02/01/99]

2/17/99 85 Memorandum In RESPONSE filed by Walter Smittle, State Fire Marshal and WV State Fire Comm. to [83-1] order to Show Cause. (Copy to Judge) (mji) [Entry date 02/19/99]

2/23/99 87 MOTION with memorandum in support by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board for Rule 11 Sanctions. (c to Judge) (mji) [Entry date 02/23/99]

2/23/99 87 RESPONSE filed by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board to [85-1] response To Dfts' Show Cause Memorandum. (Copy to Judge) (mji) [Entry date 02/23/99]

3/29/99 88 NOTICE OF APPEAL by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board. FILING FEE $ 105.00 RECEIPT # 31263. (c to Judge, 4th Cir., counsel) (mji) [Entry date 04/07/99]

3/29/99 -- Notice of appeal, certified copy of docket sheet, copies of orders and transmittal sheet sent to USCA: [88-1] appeal by Buckhannon Board, WV Residential Bd., Daisy Layman and Dorsey Pierce. (c to Judge, counsel) (mji) [Entry date 04/07/99]

4/8/99 89 Certification of Completion and Transmittal Sheet sent to USCA [88-1] appeal by Buckhannon Board, WV Residential Daisy Layman and Dorsey Pierce. (c to counsel) (mji) [Entry date 04/08/99]

4/22/99 90 Memorandum Opinion And ORDER granting [87-1] motion for Rule 11 Sanctions And Imposing Sanctions. Dfts are to pay plas attorney's fees and costs in the amount of $3,252.00 within ten days of this order. (signed by Judge Frederick P. Stamp Jr.) (c to Judge, counsel) (mji) [Entry date 04/22/99]

4/26/99 91 ORDER Of Dismissal: On 4/22/99 this Court entered a memorandum opinion and order imposing sanctions on dfts pursuant to Rule 11. As a result, this Court finds it appropriate to dismiss this civil action. (signed by Judge Frederick P. Stamp Jr.) (c to Judge, counsel, 4th Cir.) [WSF-99-140] (mji) [Entry date 04/26/99]

4/26/99 -- Case closed; S.F.: WSF-99-140. (mji) [Entry date 04/28/99]

1/24/00 92 Per Curiam from USCA: [88-1] appeal by Buckhannon Board, WV Residential Bd., Daisy

Layman, Dorsey Pierce, USCA decision: AFFIRMED, unpublished. (c to Judge) (mji) [Entry date 01/25/00]

1/25/00 -- Returned file to Elkins by Wally Edgell 1/26/00. (mji) [Entry date 01/25/00] [Edit date 01/25/00]

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2/18/00 93 ORDER (4th Circuit Court of Appeals 2/15/00): Denying Petition for Rehearing and Rehearing En Banc. (soa) [Entry date 02/24/00]

2/25/00 94 JUDGMENT ORDER USCA (certified copy) Court affirms the judgment of the District Court Re: [88-1] appeal by Buckhannon Board, WV Residential Bd., Daisy Layman and Dorsey Pierce. (c to Judge) (mji) [Entry date 02/28/00]

10/4/00 -- NOTIFICATION from 4th Circuit of the Granting of the Writ of Certiorari by U. S. Supreme Court on 9/26/00. (soa) [Entry date 10/06/00]

General Docket
Fourth Circuit Court of Appeals

99-1424 99-1424

Court of Appeals Docket #: 99-1424 Filed: 4/1/99

Nsuit: 3950 Constitutional - State Statute
Buckhannon Board, et al v. WV Dept Health Hum, et al

Appeal from: Northern District of West Virginia (Elkins)

Lower court information:

District: 0424-2 : CA-96-106-2
Presiding Judge: Frederick P. Stamp, Jr., Chief District Judge
Date Filed : 10/28/96
Date order/judgment: 1/29/99
Date NOA filed: 3/29/99

Fee status: Paid

Prior cases:
None
Current cases:
None

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[Case Style, Parties and Counsel Omitted]

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3/30/99 Docketing statement filed by Appellant Buckhannon Board, Appellant WV Residential Bd, Appellant Dorsey Pierce [2962599-1]. T/S needed? n. T/S already on file?: n. [99-1424] [ldj]

4/1/99 Civil case docketed. (ldj)

4/5/99 Docketing notice issued. [99-1424] Appellant(s) brief/joint appendix due

5/17/99 for Almost Home, Inc. for Dorsey Pierce, for WV Residential Bd, for Buckhannon Board. (ldj)

4/20/99 Designation of appendix filed by Appellant Buckhannon Board, Appellant WV Residential Bd, Appellant Dorsey Pierce, Appellant Almost Home Inc [2972248-1] [99-1424] (ldj)

4/26/99 Notice of district action filed. By order dated 4/22/99, the district court granted the motion for Rule 11 sanctions and imposed sanctions. [99-1424] (ldj)

4/29/99 Notice of district action filed. By order dated 4/26/99, the district court dismisses this civil action from the active docket. [99-1424] (ldj)

5/28/99 Brief joint appendix filed by Appellant Buckhannon Board, Appellant WV Residential Bd, Appellant Dorsey Pierce, Appellant Almost Home, Inc. Type of Service: HD Copies of brief: 8 # brf pages: 42 Copies of apx: 6 # apx pages: 345 Sufficient? Y 2-sided copying: y [99-1424] Appellee brief due 6/28/99 for Cecil H. Underwood, for John Wilkenson, for Joan E. Ohl, for Kenneth Morgan, for J.D. Waggoner, for Victor Stallard, for Bill L. Spencer, for Stephen C. McBee, for David L. Tolliver, for Gregory Alan Lay, for Daniel Hess, for Francis A. Guffey, for James W. Fife, for Randy Breeden, for Joseph J. Bostar, for John Beaty,

for WV State Fire Comm, for State of WV, for Walter Smittle, for WV Ofc State Fire, for Sandra L. Daubman, for Office of Health, for WV Dept Health Hum (ldj)

7/7/99 Brief filed by Appellee Sandra L. Daubman, Appellee WV Ofc State Fire, Appellee Walter Smittle, Appellee State of WV, Appellee WV State Fire Comm. Appellee John Beaty, Appellee Joseph J. Bostar, Appellee Randy Breeden, Appellee James W. Fife, Appellee Francis A. Guffey, Appellee Daniel Hess, Appellee Gregory Alan Lay, Appellee David L. Tolliver, Appellee Stephen C. McBee, Appellee Bill L. Spencer, Appellee Victor Stallard, Appellee J.D. Waggoner, Appellee Kenneth Morgan, Appellee Joan E. Ohl, Appellee John Wilkenson, Appellee Cecil H. Underwood, Type of Service: PM Copies: 8 # brf pages: 18. Sufficient [Y/N}: Y. [99-1424] (ldj)

7/8/99 Brief filed by Appellee WV Dept Health Hum, Appellee Office of Health. Type of Service: PM Copies: 8 # brf pages: 25. Sufficient [Y/N]: Y [99-1424] (ldj)

7/26/99 Reply brief filed by Appellant Buckhannon Board, Appellant WV Residential Bd, Appellant Dorsey Pierce. Type of Service: PM Copies of brief: 8 #brf pages: 17. Sufficient [Y/N]: Y. .. [99-1424] (ldj)

8/3/99 Motion filed by Appellee WV Dept Health Hum, Appellee Office of Health, Appellee Sandra L. Daubman to submit case on briefs without oral argument [3032095-1]. [99-1424] (ldj)

8/3/99 Motion filed by Appellee WV Ofc State Fire, Appellee Walter Smittle, Appellee State of WV, Appellee WV State Fire Comm to submit case on briefs without oral argument [3032104-1]. [99-1424] (ldj)

8/3/99 Response/answer filed [3032108-1] by Appellant Buckhannon Board, Appellant WV Residential Bd, Appellant Dorsey Pierce to motion to submit case on briefs [3032095-1], motion to submit case on briefs [3032104-1] [99-1424] Appellants simultaneously filed their motion with the motions to submit case on briefs. SAR said that I could docket as a response to the motion. (ldj)

10/13/99 Case calendared for oral argument. [99-1424] (jc)

12/2/99 Oral argument heard. Courtroom Deputy: JLE. [99-1424] (jle)

1/20/00 Unpublished per curiam opinion filed. [99-1424] (bhr)

1/20/00 Judgment order filed. Decision: affirmed. EOD Date: 1/20/00. [99-1424] (brh)

2/2/00 Petition filed by Appellant Buckhannon Board, Appellant WV Residential Bd, Appellant Dorsey Pierce for rehearing. Number copies filed: 20 [3127774-1]., for rehearing en banc. Number of copies filed: 20 [3127774-2] [99-1424] (ldj)

2/15/00 COURT ORDER filed denying motion for rehearing [3127774-1] EOD Date: 2/15/00., denying motion for rehearing en banc [3127774-2] EOD Date: 2/15/00. Copies to all counsel. [99-1424] (ldj)

2/23/00 Mandate issued. [99-1424] (ldj)

5/22/00 Supreme Court notice that petition for certiorari was filed on 05/15/00. Spct No.: 99-1848 Spct Pty 1: Buckhannon Board & Care Home Spct Pty 2: WV Dept Health & Human Resources. [99-1424] (dhb)

10/2/00 Supreme Court order received granting petition certiorari [3189534-1] on 09/26/00. [99-1424] (dhb)

[Case Style Omitted]

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND MONETARY DAMAGES

INTRODUCTION

1. This complaint seeks declaratory and injunctive relief, and monetary damages, under the Fair Housing Act, 42 U.S.C. §§3601 et seq. ("FHA"), and the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq. ("ADA"). The subject of the complaint is West Virginia State Code §§ 16-5C-1 et al., 29-3-1, et al., 30-7-1, et al. and regulations promulgated thereunder. These provisions narrowly define the class of persons who may live in Residential Board and Care Homes in West Virginia, and otherwise sharply limit the circumstances under which individuals with mental and physical disabilities may choose to live together. These provisions, both on their face and as applied to the Plaintiffs in this case, are discriminatory housing practices and violate the Fair Housing Act and the Americans with Disabilities Act. Plaintiffs seek to enjoin Defendants from applying discriminatory standards to homes with disabled adults which are not applied to other homes.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331 (federal question) and 42 U.S.C. §3613(a)(1)(A) and 42 U.S.C. § 12133. Venue is proper in the Northern District of West Virginia pursuant to 28 U.S.C. §1391(b) in that, inter alia, the events and omissions giving rise to Plaintiffs' claims occurred in Upshur County, West Virginia.

PARTIES

3. Plaintiff, Buckhannon Board and Care Home, Inc., ("BBC") is a corporation organized and existing under the laws of the State of West Virginia with its principal place of business at Buckhannon, West Virginia. BBC is an "aggrieved person" within the definition of 42 U.S.C. §3602 (i) and as used in 42 U.S.C. §3613(a)(1)(A). BBC is associated with, and provides housing to, persons with handicaps as defined in 42 U.S.C. §3602(h). BBC provides housing to "qualified individuals with a disability" as defined in 42 U.S.C. §12131(2). BBC operates three (3) residential care homes which provide housing and services to elderly people who require some assistance with activities of daily living, but who choose to live in a non-institutional setting. These homes are operated by Shirley Dean and are located at the following addresses: 4 Cleveland Avenue, 79 South Florida Street, and 12 Marion Street, Buckhannon West Virginia, 26201.

4. Plaintiff, Daisy Layman is a resident of BBC. She is over 90 years old, is mentally disabled, and is a person with a "handicap" within the meaning of 42 U.S.C. §3602 (h) and a "qualified individual with a disability" within the meaning of 42 U.S.C. §12131 (2). Because Ms. Layman is unable to understand fully the nature of these legal proceedings, she sues through Faye Byers, as her next friend.

5. Plaintiff, Dorsey Pierce, is also a resident of BBC. She is over 90 years old, is mentally disabled, and is a person with a "handicap" within the meaning of 42 U.S.C. §3602(h) and a "qualified individual with a disability" within the meaning of 42 U.S.C. §12131(2). Because Ms. Pierce is unable to understand fully the nature of these legal proceedings, she sues through Lockie J. Marple, as her next friend.

6. Plaintiff, The West Virginia Residential Board and Care Home Association ("WVRBCA"), represents and is comprised of similarly situated residential board and care homes, more fully identified on Exhibit A, attached hereto. These homes provide accommodation and personal assistance to four (4) to ten (10) persons who are not related to the home owner and are dependent upon the services of others by reason of physical or mental impairment. W Va. Code § 16-5C-2(f).

7. Defendant, West Virginia Department of Health and Human Resources ("HHR") is a Department within the Executive Department of the State of West Virginia. HHR is responsible for overseeing, administering, implementing, and enforcing all laws and developing appropriate procedures regarding health policy. Gretchen O. Lewis is the Secretary of HHR and is sued in her official capacity.

8. The Office of Health Facility Licensure and Certification ("OHFLAC") is an office within HHR that adopts, implements, and enforces regulations for the licensure of Residential Board and Care Homes. Nancy Tyler and Sandra Daubman are, respectively, the Director and Program Manager within OHFLAC. Defendants Tyler and Daubman are sued in their official capacities.

9. Defendant, West Virginia Office of the State Fire Marshal ("Fire Marshal"), is the administrative body vested with the authority under the West Virginia Code to implement and monitor fire safety regulations. Walter Smittle is the State Fire Marshal and as such, is authorized to enforce the State Fire Code and underlying Regulations. Defendant Smittle is sued in his official capacity.

10. Defendant, West Virginia State Board of Examiners for Registered Professional Nurses ("Nursing Board"), is the administrative body vested with the authority to govern the practice of registered professional nursing within the state of West Virginia. Laura S. Rhodes is the Executive Director of the Board of Examiners and as such is authorized to enforce the State Nursing Code and Regulations. Defendant Rhodes is sued in her official capacity.

11. The Defendant Gaston Caperton is the Governor of the State of West Virginia and as such is responsible for employment decisions in the HHR and for the overall enforcement policy. He is named in his official capacity as Governor of West Virginia.

12. The Defendant State of West Virginia was established by Presidential Proclamation in 1863 as an independent State.

STATUTORY AND REGULATORY BACKGROUND

Office of Health Facility Licensure and Certification

13. The State has enacted a statutory and regulatory scheme, codified at §§ 16-5C-1, et al. of the West Virginia Code and accompanying State Regulations, 64 CSR §§ 65-1 et al., (hereinafter collectively referred to as "Chapter 16"), purporting to govern the establishment and operation of group homes for persons with disabilities, known as "residential board and care facilities" ("RBCF"). The applicability of the proscriptions of Chapter 16, and therefore, the right of individuals with mental and physical handicaps to live where they choose in West Virginia, is intentionally and expressly limited because of the nature of those individuals' mental and

physical handicaps. As such, the enforcement of Chapter 16 is discrimination in violation of the Fair Housing Act and the Americans with Disabilities Act.

14. The OHFLAC is responsible for enforcing the requirements of Chapter 16. Pursuant to Chapter 16, the OHFLAC may conduct periodic inspections of facilities licensed under Chapter 16, and may issue Deficiency Correction Orders to RBCFs that are not in compliance with the State's regulations.

15. BBC is licensed by the State under Chapter 16. Up to ten persons, including Plaintiffs Daisy Layman and Dorsey Pierce, live at each of the three homes. Between one and four employees staff each BBC site at all times, providing the residents with assistance in their activities of daily living.

16. In addition to being licensed under Chapter 16, BBC is in full compliance with the State Fire Safety Code governing RBCFs.

17. Under Chapter 16, only persons meeting the statutory definition of "self-preservation" are permitted to live in Residential Board and Care Facilities. Pursuant to West Virginia CSR § 64-65-3.32, "self-preservation" is defined as "the capability of , at least, removing one's physical self from situations involving imminent danger, such as fire."

18. OHFLAC is enforcing the "self-preservation" rule set forth above against BBC because it is providing housing to Plaintiffs Daisy Layman and Dorsey Pierce.

Fire Code

19. The State has enacted a Statutory and regulatory scheme, codified at §§ 29-3-1 et al. of the West Virginia Code and accompanying State Regulations, 87 West Virginia CSR §§ 1-1 et al., (hereinafter collectively referred to as "Chapter 29"), which in general govern fire prevention and control within the State.

20. West Virginia CSR § 87-1-14.7 in part mandates all residents of RBCFs shall be capable of self-preservation. "Self-preservation" is defined as the capability of "removing his or her physical self from situations involving imminent danger, such as fire."

21. Among other things, Chapter 29 also mandates that RBCFs must provide:

a. Electrically supervised fire alarm.
b. Automatic sprinkler system.
c. Hardwired smoke detectors.

22. None of these provisions are required for other residential homes.

Nursing Act

23. The State has enacted as statutory and regulatory scheme codified at §§ 30-7-1 et al.. of the West Virginia Code and accompanying State regulations, § 19 CSR 1.1 et al.. (hereinafter collectively referred to as "Chapter 30" or "Nursing Act") which governs the practice of professional nursing in the State.

24. West Virginia Code § 30-7-1 defines the "practice of Registered Nursing" as:

the performance for compensation of any service requiring substantial specialized judgment and skill based on knowledge and application of principles of nursing derived from the biological, physical and social sciences, such as responsible supervision of a patient requiring skill in observation of symptoms and reactions and the accurate recording of the facts, or the supervision and teaching of other persons with respect so such principles of nursing, or in the administration of medications and treatments as prescribed by a licensed physician or a licensed dentist, or the application of such nursing procedures as involve understanding of cause and effect in order to safeguard life and health of a patient and others. (emphasis added)

25. West Virginia CSR § 19-10-3 provides inter alia:

> 3.10 The registered professional nurse shall delegate to another only those nursing measures which that person is prepared or qualified to perform.
>
> 3.11 The registered professional nurse shall supervise others to whom nursing interventions are delegated.
>
> 3.12 The registered professional nurse shall retain professional accountability for nursing care when delegating nursing interventions.

26. The Nursing Board has interpreted the above provisions to prohibit the administering of any medications, by anyone other than a registered professional nurse.

Similarly Situated Residents and Homes

27. Chapter 16 applies to RBCFs with 4 to 10 residents. W.Va. Code §16-5C-2(f). A similar definition is provided in Chapter 29. W Va. CSR § 87-1-14.7. By definition, RBCFs with 1 to 3 residents are not subject to either Chapter 16 or Chapter 29. The effect has been a drastic increase in the number of unregulated homes with three residents. The number of these homes has increased to approximately 250. Exhibit B.

28. Fraternal organizations are permitted to develop and operate homes and asylums for the care and support of orphans and widows of deceased members, and of disabled and aged members in indigent circumstances. The fraternal operated homes are not subject to Chapters 16 and 29. These homes are self-governed:

> Any such grand lodge desiring to establish a home or asylum shall adopt and prescribe such rules an regulations for the government and control thereof as may be deemed wise by such grand body; and it shall appoint a board of directors, trustees, regents or commissioners, composed of a specified number of persons from its own membership, not fewer than seven nor more than eleven, to serve for definite periods; and any such grand lodge may select for each of such boards two members from the associate branches of the orders, known as

> Pythian Sisters, Rebekahs, Eastern Star, or other like organizations, as the case may be. Such board shall have the management and control of the home or asylum for which it is appointed, under the prescribed rules and regulations adopted by said body for the government thereof. Such board of directors, trustees, regents or commissioners shall organize by the election of a president, secretary and treasurer, and , if necessary or expedient, an executive committee, all from its own membership. W.Va. Code §35-3-2.

29. Group residential facilities are subject to different less stringent regulations. "Group residential facility" means a facility which:

> (1) Provides residential services and supervision for individuals who are developmentally disabled or behaviorally disabled; (2) is occupied as a residence by not more than eight individuals who are developmentally disabled and not more than three supervisors, or is occupied as a residence by not more than twelve individuals who are behaviorally disabled and not more than three supervisors; (3) is licensed by the department of health or the department of human services; and (4) complies with the state fire commission for residential facilities. W.Va. Code §27-17-1.

Group residential facilities are not subject to Chapters 16 and 29 requirements.

30. Residents who do not qualify under the "self preservation" definition may reside in an RBCF if they are receiving hospice care.

STATE ACTION AND FACTUAL BACKGROUND

Self-Preservation

31. Neither Daisy Layman nor Dorsey Pierce is capable of "self-preservation" within the meaning of Chapters 16 or 29, because neither is independently capable of exiting from a building, following instruction and responding to an alarm. Both are, however, capable of safely exiting with the staff assistance available there.

32. On January 30, 1996, an inspector from OHFLAC, inspected BBC, and issued a Statement of Deficiency on the grounds that, because of their handicaps, ie their mobility to exit the premises without assistance, they did not meet the definition of "self-preservation."

33. BBC's Plan of Correction was rejected because the residents in question would not be evicted from BBC and transferred to a nursing home. A true and accurate copy of the February 1996 Deficiency Statement and related documents is attached hereto as Exhibit C.

34. A second OHFLAC inspection occurred on September 3, 1996. BBC was again cited for failing to comply with the "self-preservation" rule. Exhibit D.

35. The State Fire Marshal also conducted an investigation of BBC. BBC was cited for failure to meet the Chapter 29 definition of "self-preservation".

36. Following the issuance of the Deficiency Statements, BBC attempted to persuade the Defendants to make reasonable accommodations for Ms. Layman and Ms. Pierce. An exception to the "self-preservation" rule, was permissible in the past, which permitted Ms. Layman and Ms. Pierce to remain at BBC. Specifically, prior to 1996, OHFLAC permitted residents to Waive enforcement of the self-preservation. Attached as Exhibit E are copies of such Waivers. The Defendants refused to accommodate BBC's requests for exception.

37. On October 24, 1996, BBC received an Order from OHFLAC to cease operating as a RBCF and to relocate all residents within thirty (30) days. Exhibit F.

38. The care provided Daisy Layman and Dorsey Pierce at BBC is well suited to their needs. Neither is in need of expensive nursing care; both require only custodial care. BBC provides an important service by preventing premature institutionalization in accordance with the statutory purpose of Chapter 16, stated as follows:

> It is the policy of this State to encourage and promote the development and utilization of resources to ensure the effective care and treatment of persons who are convalescing or whose physical or mental condition requires them to receive a degree of nursing or related health care greater than that necessary for well individuals, but not so acute as to require hospitalization. Such care and treatment requires a living environment for such persons which, to the extent practicable, will approximate a normal home environment. To this end, the guiding principle for administration of the laws of the State is that such persons shall be encouraged and assisted in securing necessary care and treatment in noninstitutional surroundings. In recognition that for many such persons effective care and treatment can only be secured from proprietary, voluntary and governmental nursing homes or personal care homes it is the policy of this State to encourage, promote and require the maintenance of institutions other than hospitals offering nursing or related health care or personal care so as to ensure protection of the rights and dignity of those using the services of such facilities. W. Va. Code § 16-5-C-1 (emphasis added).

39. Moreover, both wish to remain at BBC, and their families want them to remain at BBC. The homes are located near their families and the cost of care is well below that which would be charged by a nursing facility. Further, BBC's homes are in full compliance with the fire code including, among others, smoke detectors and sprinkler systems, as well as around the clock supervision. All of these factors eliminate any fire safety concerns.

CAUSES OF ACTION
COUNT I
(Fair Housing Act as it relates to "self-preservation")

40. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 39 as though fully set forth herein.

41. The FHA prohibits discrimination on the basis of a physical or mental handicap. Section 3604(f)(1) of the Act makes it unlawful [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of :

(a) that buyer or renter;

(b) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(c) any person associated with that buyer or renter.

42. Similarly, it is unlawful to discriminate against any person in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling because of a handicap of that person." 42 U.S.C. § 3604(f)(2).

43. The FHA, also makes it unlawful to coerce, intimidate, or retaliate against someone for having exercised rights protected by the FHA. 42 U.S.C. § 3617. Furthermore, the FHA requires defendants to make "reasonable accommodations in rules, policies, practices, or services," when such accommodations would enable a person with disabilities to live where he or she chooses. 42 U.S.C. § 3604(f)(3)(B).

44. Plaintiffs, Daisy Layman and Dorsey Pierce, are handicapped persons or persons associated with handicapped persons within the meaning of 42 U.S.C. §3602(h).

45. By virtue of their definition of "self-preservation," Chapters 16 and 29 effectively prohibit any person with the handicap of dementia from living in a group home. The Chapters also prohibit a person with quadriplegic or heimplesia from living in such a home under most circumstances, as well as adults and children with severe or profound mental retardation or acute mental illness. Moreover, it prohibits individuals suffering from normal degenerative aging ailments from residing in group homes.

46. The Chapters 16 and 29 definition of "self-preservation" is not applied to residents of all group homes or other residences, but is selectively applied to residents of group homes for the elderly.

47. The Defendants have refused to make an exception or accommodation in their regulations which would permit Daisy Layman and Dorsey Pierce to continue living at BBC.

48. Defendant's actions as described above are taken with the intent to discriminate and have the effect of discriminating against persons with disabilities and the aged.

49. Defendant's actions as described above have injured and are injuring the Plaintiffs. BBC has expedited considerable resources in seeking a modification of the "self-preservation" rule for Daisy Layman and Dorsey Pierce, and if Daisy Layman and Dorsey Pierce are indeed evicted, BBC will suffer a loss of income. Moreover, the events surrounding the

issuance of the Cease and Desist Order have had a demoralizing effect on BBC staff and residents. Plaintiffs Daisy Layman and Dorsey Pierce are being denied their civil rights to live where they wish. Both Daisy Layman and Dorsey Pierce, as well as their families, have experienced significant emotional distress because of the eviction notice, and the possibility that they will be institutionalized.

50. The Chapters 16 and 29 definition of "self-preservation," both on its face and as applied to these Plaintiffs, violates Plaintiffs' rights under the Fair Housing Act, 42 U.S.C. §§3604(f) and 3617, by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without disabilities;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their disabilities;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

51. Article VI of the United States Constitution, otherwise known as the Supremacy Clause, provides in pertinent part:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof...shall be the Supreme Law of the Land; and Judges in every State shall be bound thereby, anything in the Constitution of Laws of any State to the contrary notwithstanding.

52. The Chapters 16 and 29 definition of "self preservation" is in violation of the FHA and is preempted by the FHA and Article VI, United State Constitution.

COUNT II
(Americans with Disabilities Act as it relates to "self-preservation")

53. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 52 as though fully set forth herein.

54. The ADA prohibits discrimination on the basis of a disability by a public entity. Section 12132 provides that:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132.

55. Plaintiffs, Daisy Layman and Dorsey Pierce, are qualified individuals with a disability within the meaning of 42 U.S.C. § 12131(2).

56. Article VI of the United States Constitution, otherwise known as the Supremacy clause, provides in pertinent part:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof...shall be the Supreme Law of the Land; and Judges in every State shall be bound

thereby, anything in the Constitution of Laws of any State to the contrary notwithstanding.

57. By virtue of their definition of "self-preservation," Chapters 16 and 29 effectively prohibit any person with the handicap of dementia from living in a group home. The Chapters also prohibit a person with quadriplegic or heimplesia from living in such a home under most circumstances, as well as adults and children with severe or profound mental retardation or acute mental illness. Moreover, it prohibits individuals suffering from normal degenerative aging ailments from residing in group homes.

58. The Chapters 16 and 29 definition of "self-preservation" is not applied to residents of all group homes or other residences, but is selectively applied to residents of group homes for the elderly.

59. The Defendants have refused to make an exception or accommodation in their regulations which would permit Daisy Layman and Dorsey Pierce to continue living at BBC.

60. Defendant's actions as described above are taken with the intent to discriminate and have the effect of discriminating against persons with disabilities and the aged.

61. Defendant's actions as described above have injured and are injuring the Plaintiffs. BBC has expedited considerable resources in seeking a modification of the "self-preservation" rule for Daisy Layman and Dorsey Pierce, and if Daisy Layman and Dorsey Pierce are indeed evicted, BBC will suffer a loss of income. Moreover, the events surrounding the issuance of the Cease and Desist Order have had a demoralizing

effect on BBC staff and residents. Plaintiffs Daisy Layman and Dorsey Pierce are being denied their civil rights to live where they wish. Both Daisy Layman and Dorsey Pierce, as well as their families, have experienced significant emotional distress because of the eviction notice, and the possibility that they will be institutionalized.

62. The Chapters 16 and 29 definition of "self-preservation", both on its face and as applied to Plaintiffs Daisy Layman and Dorsey Pierce, violates Plaintiff's rights under the Americans with Disabilities Act of 1990, 42 U.S.C. §12131 and 12132, and the regulations promulgated thereunder, 28 C.F.R. §35.130, by:

(a) denying the Plaintiffs, by reason of their disabilities, the opportunity to participate in or benefit from the services and programs offered by BBC:

(b) subjecting the Plaintiffs, by reason of their disabilities, to discrimination;

(c) denying the Plaintiffs an opportunity to participate in a program in the most integrated setting appropriate to their needs;

(d) imposing and applying eligibility criteria that screen out the Plaintiffs from fully and equally enjoying the services and program offered by BBC:

(e) denying the Plaintiffs an opportunity to participate in or benefit from the services and program offered by BBC that is equal to that of older people without disabilities.

63. The Chapters 16 and 29 definition of "self preservation" is in violation of the ADA and is preempted by the ADA and Article VI, United States Constitution.

COUNT III

(Fair Housing Act as it relates to the Nursing Act)

64. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 63 as though fully set forth herein.

65. Plaintiffs, Daisy Layman and Dorsey Pierce, occasionally need assistance with taking medication.

66. By definition of Chapter 30, this can only be done by a registered professional nurse.

67. By virtue of this Chapter 30 effectively prohibits any person with a handicap of disability from residing anywhere other than an institution with skilled nursing care.

68. The Chapter 30 limitation on the administration of medication, both on its face and as applied to Plaintiffs, Daisy Layman and Dorsey Pierce, violates their rights under the Fair Housing Act by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without disabilities;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their disabilities;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

69. The Chapter 30 limitation on medication administration violates the FHA and is preempted by the FHA and Article VI, United States Constitution.

COUNT IV
(Americans with Disabilities Act as it relates to the Nursing Act)

70. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 69 as though fully set forth herein.

71. The Chapter 30 limitation on the administration of Medication, both on its face and as applied to Plaintiff's, Daisy Layman and Dorsey Pierce, violates their rights under Americans with Disabilities Act by:

(a) denying the Plaintiffs, by reason of their disabilities, the opportunity to participate in or benefit from the services and programs offered by BBC:

(b) subjecting the Plaintiffs, by reason of their disabilities, to discrimination;

(c) denying the Plaintiffs as opportunity to participate in a program in the most integrated setting appropriate to their needs;

(d) imposing and applying eligibility criteria that screen out the Plaintiffs from fully and equally enjoying the services and program offered by BBC:

(e) denying the Plaintiffs an opportunity to participate in or benefit from the services and program offered by BBC that is equal to that of older people without disabilities.

72. The Chapter 30 limitation on medication administration violates the ADA and is preempted by the ADA and Article VI, United States Constitution.

COUNT V
(Discriminatory Treatment of Similarly Situated Homes)

73. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 72 as though fully set forth herein.

74. The State of West Virginia has selectively and arbitrarily enacted and applied onerous laws and regulations governing RBCFs. In contrast, homes and asylums of fraternal orders, group residential facilities, RBCFs with less than 4 residents, and hospice patients residing in RBCFs are all exempted from these same or similar laws and regulations.

75. The Defendants' enactment and application of extensive and onerous laws and regulations of Chapters 16 and 29 to RBCFs, while exempting other similarly situated homes and residents, is arbitrary and capricious and violates equal protection and Due Process guarantees of the Constitutions of the United States and West Virginia.

COUNT VII

(Preliminary and Permanent Injunctive Relief)

76. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 75 as though fully set forth herein.

77. The enforcement of the Cease and Desist Order issued by OHFLAC to BBC on October 24, 1996 and any others issued to similarly situated RBCFs will cause the Plaintiffs irreparable harm for which they have no adequate remedy at law. Such irreparable harm consists of the eviction of thirty residents against their will for which there are no alternatives other than relocation to a nursing home for costs in excess of double those currently incurred by residents of RBCF's. BBC and other RBCFs and their employees will

likewise suffer irreparable harm through loss of income. Such losses are incapable of being determined so as to allow an award of damages as a remedy at law.

78. Plaintiffs fear retaliation by the State of West Virginia, through its Departments, Bureaus, Divisions and officers identified herein, as a result of filing this Complaint. For example, OHFLAC has great latitude and discretion with regard to inspections and enforcement of Chapter 16. The Plaintiff's fear the Defendants may take further action, impose civil penalties or revoke or deny other licenses.

79. Based upon information and belief, some RBCFs declined to join this action because of this fear. Despite the fear of reprisal, the Plaintiffs' have resolved that their homes are in jeopardy and serious risk of closure or insolvency.

80. The harm to the Plaintiff's in the absence of injunctive relief outweighs the potential harm to the Defendants should they prevail on the merits, if injunctive relief is granted by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff's request that the Court grant the following relief:

(a) To enter a Declaratory Judgment that the "self-preservation" definition under Chapter 16 is in violation of the Fair Housing Act, 42 U.S.C. §§ 3601 et. seq.; and the Americans with Disabilities Act, 42 U.S.C. §§12101 et. seq.;

(b) To enter a Declaratory Judgment that the "self-preservation" definition under Chapter 29 as it applies to RBCF's which comply with all Fire Code provisions is in violation of and preempted by the Fair Housing Act and the

Americans with Disabilities Act. W. Va. Code §29-3-1 et al. and W. Va. CSR § 87-1-14.7;

(c) To enter a Declaratory Judgment that the Fire Code requirements of an electrically supervised fire alarm, automatic sprinkler system, and hardwired smoke detectors as it applies to RBCF's which do not house individuals incapable of self-preservation is in violation of and preempted by the Fair Housing Act and the Americans with Disabilities Act. W. Va. Code §39-3-1 et al. and W. Va. CSR § 87-1-14.7;

(d) Preliminarily and permanently enjoin the Defendants, State of West Virginia, HHR, OHFLAC and Fire Marshal, their agents, and employees, and successors, from enforcing any orders that Daisy Layman and Dorsey Pierce, or other similarly situated residents, be evicted from BBC, and from otherwise enforcing its "self-preservation" rule against BBC and any Residential Board and Care Homes;

(e) To enter a Declaratory Judgment that the "administration of medication" limitation of the Nursing Board is overly broad and in violation of and preempted by the Fair Housing Act, 42 U.S.C., §§ 3601 et seq; and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq;

(f) Preliminarily and permanently enjoin the State of West Virginia, the Governor, HHR, the HHR Secretary, OHFLAC, OHFLAC Director, Nursing Board, the Nursing Board Executive Secretary, including their agents, officers and employees thereof, from taking any action against any participating RBCF until a hearing is held and a decision rendered in this matter.

(g) To enter a Declaratory Judgment that Chapters 16 and 29 insofar as they discriminate against RBCFs by applying different laws and regulations than other similarly situate homes is void as a violation of the United States Constitutional guarantees of Due Process and Equal Protection.

(h) Award appropriate punitive and compensatory damages to the Plaintiffs and against Defendants;

(i) Award the Plaintiffs their costs and reasonable attorneys' fees in this action; and,

(j) Order such other relief as this Court deems just and proper.

BUCKHANNON BOARD AND CARE HOME, INC; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DAISY LAYMAN, by her next friend, FAYE BYERS; DORSEY PIERCE, by her next friend LOCKIE J. MARPLE and on behalf of all others similarly situated.

By Counsel

LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS

s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III
Chad B. McIntosh
Post Office Box 1746
Charleston, West Virginia 25326
(304) 345-2000

[Verifications omitted]

[The Exhibits to The Complaint Have Not Been Made a Part of The Joint Appendix, With The Exception of The Following Portions of Exhibit F]

State of West Virginia
Department of Health And
Human Resources

Gaston Caperton
Governor

October 18, 1996

Buckhannon Board & Care, Inc. #1
Shirley Dean, Administrator
P.O. Box 474 (Mailing Address)
4 Cleveland Avenue (Facility Address)
Buckhannon, West Virginia 25201

Re: Buckhannon Board & Care, Inc. #1

Dear Ms. Dean:

Enclosed you will find an order issued by the Director of the Office of Health Facility Licensure and Certification (OHFLAC) for your failure to comply with West Virginia Residential Board and Care Home regulations.

If you have any questions regarding this order you can contact me using the address or phone number below.

Sincerely,
s/ Sandra L. Daubman
Sandra L. Daubman, M.S., CFCS
Program Manager
Office of Health Facility
Licensure and Certification

SLD:mia
Enclosure

cc: Mr. Robert Bible, Attorney
Commission on Aging
Adult Protective Services
St. Fire Marshal's Office

OFFICE OF HEALTH FACILITY LICENSURE
AND CERTIFICATION
1900 Kanawha Boulevard East, Building 3, Room 550
Charleston, WV 25305
Telephone: (304)558-0050

In re: Buckhannon Board & Care, Inc. #1
Shirley Dean, Administrator
P.O. Box 474 (Mailing Address)
4 Cleveland Avenue (Facility Address)
Buckhannon, West Virginia 26201

ORDER

Pursuant to West Virginia Code, §§ 16-5C-6, 16-5H-2 and the regulations duly promulgated thereunder, the Office of Health Facility Licensure and Certification hereby DENIES your application for licensure as a Residential Board and Care Home.

The grounds upon which this action is taken are as follow:

1. The application is incomplete, in that:

a. The State Fire Marshal has made a recommendation that no license be issued.

You are ORDERED to refrain from admitting any further residents to the above facility, to cease operating as a Residential Board and Care Home, and to effect relocation of your existing population within thirty (30) days of receipt of this Order.

Be advised of the availability of a hearing pursuant to W.Va. Code, § 16-5C-12, should you feel aggrieved by this Order. Any request for hearing must be had in this office within ten (10) days of receipt of this Order.

ENTERED this 18th day of October, 1996.

s/ Nancy Tyler
Nancy Tyler, Director
Office of Health Facility
Licensure and Certification

STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND
HUMAN RESOURCES

Gaston Caperton
Governor

October 18, 1996

Buckhannon Board & Care, Inc. #2
Shirley Dean, Administrator
P.O. Box 474 (Mailing Address)

4 Cleveland Avenue (Facility Address)
Buckhannon, West Virginia 25201

Re: Buckhannon Board & Care, Inc. #2

Dear Ms. Dean:

Enclosed you will find an order issued by the Director of the Office of Health Facility Licensure and Certification (OHFLAC) for your failure to comply with West Virginia Residential Board and Care Home regulations.

If you have any questions regarding this order you can contact me using the address or phone number below.

Sincerely,
s/ Sandra L. Daubman
Sandra L. Daubman, M.S., CFCS
Program Manager
Office of Health Facility
Licensure and Certification

SLD:mia
Enclosure

cc: Mr. Robert Bible, Attorney
Commission on Aging
Adult Protective Services
St. Fire Marshal's Office

OFFICE OF HEALTH FACILITY LICENSURE
AND CERTIFICATION
1900 Kanawha Boulevard East, Building 3, Room 550

Charleston, WV 25305
Telephone: (304)558-0050

In re: Buckhannon Board & Care, Inc. #2
Shirley Dean, Administrator
P.O. Box 474 (Mailing Address)
4 Cleveland Avenue (Facility Address)
Buckhannon, West Virginia 26201

ORDER

Pursuant to West Virginia Code, §§ 16-5C-6, 16-5H-2 and the regulations duly promulgated thereunder, the Office of Health Facility Licensure and Certification hereby DENIES your application for licensure as a Residential Board and Care Home.

The grounds upon which this action is taken are as follow:

1. The application is incomplete, in that:

   a. The State Fire Marshal has made a recommendation that no license be issued.

You are ORDERED to refrain from admitting any further residents to the above facility, to cease operating as a Residential Board and Care Home, and to effect relocation of your existing population within thirty (30) days of receipt of this Order.

Be advised of the availability of a hearing pursuant to W.Va. Code, § 16-5C-12, should you feel aggrieved by this

Order. Any request for hearing must be had in this office within ten (10) days of receipt of this Order.

ENTERED this 18th day of October, 1996.

s/ Nancy Tyler
Nancy Tyler, Director
Office of Health Facility
Licensure and Certification

STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND
HUMAN RESOURCES

Gaston Caperton
Governor

October 18, 1996

Buckhannon Board & Care, Inc. #3
Shirley Dean, Administrator
P.O. Box 474 (Mailing Address)
4 Cleveland Avenue (Facility Address)
Buckhannon, West Virginia 25201

Re: Buckhannon Board & Care, Inc. #3

Dear Ms. Dean:

Enclosed you will find an order issued by the Director of the Office of Health Facility Licensure and Certification

(OHFLAC) for your failure to comply with West Virginia Residential Board and Care Home regulations.

If you have any questions regarding this order you can contact me using the address or phone number below.

Sincerely,
s/Sandra L. Daubman
Sandra L. Daubman, M.S., CFCS
Program Manager
Office of Health Facility
Licensure and Certification

SLD:mia
Enclosure

cc: Mr. Robert Bible, Attorney
Commission on Aging
Adult Protective Services
St. Fire Marshal's Office

OFFICE OF HEALTH FACILITY LICENSURE
AND CERTIFICATION
1900 Kanawha Boulevard East, Building 3, Room 550
Charleston, WV 25305
Telephone: (304)558-0050

In re: Buckhannon Board & Care, Inc. #3
Shirley Dean, Administrator
P.O. Box 474 (Mailing Address)
4 Cleveland Avenue (Facility Address)
Buckhannon, West Virginia 26201

ORDER

Pursuant to West Virginia Code, §§ 16-5C-6, 16-5H-2 and the regulations duly promulgated thereunder, the Office of Health Facility Licensure and Certification hereby DENIES your application for licensure as a Residential Board and Care Home.

The grounds upon which this action is taken are as follow:

1. The application is incomplete, in that:

   a. The State Fire Marshal has made a recommendation that no license be issued.

You are ORDERED to refrain from admitting any further residents to the above facility, to cease operating as a Residential Board and Care Home, and to effect relocation of your existing population within thirty (30) days of receipt of this Order.

Be advised of the availability of a hearing pursuant to W.Va. Code, § 16-5C-12, should you feel aggrieved by this Order. Any request for hearing must be had in this office within ten (10) days of receipt of this Order.

ENTERED this 18th day of October, 1996.

s/ Nancy Tyler
Nancy Tyler, Director
Office of Health Facility
Licensure and Certification

87 CSR 1

TITLE 87
LEGISLATIVE RULES
FIRE COMMISSION

SERRIES 1
FIRE CODE

§ 87-1-4. National Standards and Codes.

4.1. Incorporated of National Standards and Codes - The standards and requirements as set out and established by the 1994 edition of "The National Fire Codes" published by the National Fire Protection Association. [The National Fire Protection Association (NFPA) organized in 1896 is an independent, voluntary membership, nonprofit (tax-exempt) organization and has as it's mission the safeguarding of people, their property, and the environment from destructive fire, using scientific and engineering techniques and education] and the State Building Code, but not including standards and requirements directed to the operation of local fire departments, NFPA 101M and Chapters 22 and 23 of NFPA 101 and have the same force and effect as if set out verbatim in this rule and are hereby adopted and promulgated by the State Fire Commission as a part of the State Fire Code. The State Fire Marshal shall make use of the standards and requirements within the publications in all matters coming under his or her jurisdiction. A copy of The National Fire Codes has been filed with the Secretary of State and a copy of the Table of Contents of said publication is included in Section 4.5 of this rule. Information regarding the purchase of The National Fire Code (or separate volumes thereof) may be obtained by writing to the

National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts 02269.

§ 87-1-14. Miscellaneous Provisions.

14.7. Residential Board and Care Occupancies

Application: All facilities classified as residential board and care occupancies shall conform to the following requirements:

Definitions:

Residential Board and Care Occupancy. A building or part of a building used to provide lodging, boarding, and personal care services for four (4) up to and including ten (10) residents unrelated by blood or marriage to its owners or operators.

Personal Care. "Personal Care" means protective care of a resident who does not require chronic or convalescent medical or nursing care. Personal care involves responsibility for the safety of the resident when in the building. Protective care may include a daily awareness by the management of the resident's functioning and his or her whereabouts, the arrangement of appointments and reminders of appointments for a resident, the ability and readiness to intervene if a crisis arises for a resident, supervision in areas of nutrition and medication, and actual provision of transient medical care.

Self-preservation. A person is capable of removing his or her physical self from situations involving imminent danger, such as fire.

Other definitions applicable to these requirements can be found in NFPA 101, Life Safety Code.

Requirements:

(1) All residents shall be capable of self-preservation.

* * *

[Case Style Omitted]

DEFENDANT'S ANSWER TO THE COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND MONETARY DAMAGES

Comes now Defendant West Virginia Office of the State Fire Marshal, Walter Smittle, Fire Marshal, by counsel, Chad M. Cardinal, Assistant Attorney General to answer the complaint filed in the above-styled matter as follows:

First Affirmative Defense

1. Defendant denies all allegations contained in the complaint except as specifically admitted herein.

2. Defendant denies all allegations contained in paragraph nos. 1, 2, 14, 18, 27, 44, 45, 46, 48, 49, 50, 52, 55, 57-63, 68, 69, 71, 72, 74, 75, 77-80 of the complaint.

3. On information and belief, Defendant admits the identity of Plaintiff Buckhannon Board and Care Home, Inc. (hereinafter "BBC") as a corporation who for profit provides

housing and services to elderly people, and further admits on information and belief the street address of BBC as alleged in paragraph no. 3 of the complaint. Defendant Fire Marshal denies all other allegations contained in paragraph no. 3 of the complaint.

4. Defendant on information and belief, admits the identities of Plaintiffs Daisy Layman, and Dorsey Pierce as individuals over the age of 90, who are incapable of "self-preservation" as alleged in paragraph nos. 4 and 5 of the complaint. Defendant denies all other allegations contain in paragraph nos. 4 and 5 of the complaint.

5. On information and belief, Defendant admits the identity of Plaintiff West Virginia Residential Board and Care Home Association as an association of Residential Board and Care Homes. Defendant denies all other allegations contained in paragraph no. 6 of the Complaint.

6. Defendant admits that the West Virginia Department of Health and Human Resources (hereinafter "DHHR") is a department within the executive department of the State of West Virginia. Further, Defendant admits Gretchen O. Lewis is the secretary of DHHR. Defendant denies all other allegations contained in paragraph no. 7 of the complaint.

7. Defendant admits the Office of Health Facility Licensure and Certification is an office within DHHR. On information and belief, Defendant admits that Nancy Tyler and Sandra L. Daubman are respectively the Director and Program Manager of the Office of Health Facility Licensure and Certification. Defendant denies all other allegations contained in paragraph no. 8 of the complaint.

8. Defendant admits that the West Virginia Office of the State Fire Marshal is the administrative body vested with the authority under West Virginia Code to implement and monitor fire safety regulations. Further, Defendant Fire Marshal admits that Walter Smittle is the State Fire Marshal. Defendant denies all other allegations contained in paragraph no. 9 of the complaint.

9. Defendant admits that the West Virginia State Board of Examiners for Registered Professional Nurses is an administrative body which governs the practice of registered nursing within the State of West Virginia. Defendant is without the information to form a belief as to the veracity of the other statements contained in paragraph no. 10 and therefore denies the same.

10. Defendant admits that Gaston Caperton is currently the Governor of the State of West Virginia. Defendant denies all other allegations contained in paragraph no. 11 of the complaint.

11. Paragraph no. 12 of the complaint concerning the formation of the State of West Virginia is admitted.

12. Defendant admits that Plaintiff, BBC is in compliance with the State Fire Code governing the operation of "Residential Board and Care Facilities" (hereinafter "RBCF") which requires, pursuant to National Fire Protection Standard 13d, warning devices and mechanisms designed to provide residents the opportunity to respond to and evacuate the structure. However, Plaintiff BBC is not in compliance with the State Fire Codes governing the operation of facilities designed and licenced to house individuals incapable of

responding to the fire alarms. Defendant denies all other allegations contained in paragraph no. 16 of the complaint.

13. Defendant admits that the West Virginia Code section defines individuals capable of "self-preservation" as having a minimum capacity "of at least removing one's physical self from situations involving eminent danger such as fire." Defendant Fire Marshal denies all other allegations contained in paragraph no. 17 of the complaint.

14. Paragraph no. 22 of the complaint is denied. Plaintiff has obviously failed to notice W. Va. Code § 29-3-16a which requires smoke detectors or sprinkler systems (In compliance with National Fire Protection Standard 13d) in all one and two family dwellings used solely for the purpose of private residential housing. Paragraph no. 22 of the complaint is denied and strict proof is demanded thereof.

15. Inasmuch as paragraph nos. 13, 14, 19, 20, 21, 23, 24, 25, 28, 29, 41, 42, 43, 51, 54 and 56 of the complaint concerns paraphrasing of the laws which speak for themselves as opposed to allegations of fact, same is neither admitted nor denied. Defendant asks the Court to take notice of the complete text of the relevant code sections. Defendant denies all allegations contained in the aforementioned paragraphs of the complaint.

16. Defendant admits that Plaintiffs Daisy Layman and Dorsey Pierce are not capable of exiting from a building, following instructions, or responding to the fire alarm installed in Plaintiff BBC's place of business as alleged in paragraph no. 31 of the complaint. Defendant admits the allegations contained in the aforementioned paragraph.

17. On information and belief, Defendant admits paragraph no. 32 of the complaint.

18. Defendant does not have knowledge or information to form a belief as to the truth of the statements contained in paragraph nos. 15, 26, 30, 33, 34, 36, 37, 38, and 65-67 of the complaint, therefore, deny same.

19. In response to paragraph no. 35 of the complaint, Defendant admits that it conducted an investigation of Plaintiff BBC, however, the Fire Marshal's Office has not cited Plaintiff BBC. No orders or official action on the part of the Fire Marshal's Office, other than recommendations to DHHR, have been made in the above-styled matter. Accordingly, the allegations contained in paragraph no. 35 of the complaint are denied.

20. Defendant denies the allegations contained in paragraph no. 39 of the complaint. As noted in paragraph no. 12 of this answer, though Plaintiff BBC is in compliance with the fire code as it relates to the operation of the "Residential Board and Care Facility," Plaintiff is not in compliance with either the West Virginia Fire Code or National Fire Standards for the operation of a facility which houses individuals who are impractical to evacuate. Accordingly, all allegations contained in paragraph no. 39 of the complaint are denied.

21. Paragraph nos. 40, 53, 64, 70, 73 and 76 of the complaint are neither admitted nor denied as is set forth in this answer.

22. Paragraph no. 47 is denied. Inasmuch as the Plaintiffs have failed to exercise any State administrative remedy concerning the Fire Marshal's recommendation and

sought no exception or accommodation by petitioning the State Fire Commission, pursuant to W. Va. Code § 29-3-18, the allegation contained in paragraph no. 47 as to Defendant Fire Marshal's Office is expressly denied.

23. Defendant denies the Plaintiff is entitled to any of the relief sought.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the Eleventh Amendment to the United States Constitution.

THIRD AFFIRMATIVE DEFENSE

Plaintiff has failed to state a case or controversy concerning Defendant Fire Marshal. Plaintiff makes no allegation that any controversy exists with the Fire Marshal's Office, and makes no claim that any order or enforcement action has occurred by Defendant. As such, Plaintiff's action against this Defendant is barred by Article 3, Section 2 of the United States Constitution.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff has failed to state a claim upon which relief may be granted.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff has failed to name the proper party. Plaintiff alleges certain defects in the state minimum standards for fire safety and the Fire Code. Pursuant to W. Va. Code § 29-3-5, the State Fire Commission, not the State Fire Marshal (an

independent enforcement office created pursuant to W. Va. Code § 29-3-11) promulgates and repeals regulations for the safeguarding of life and property. Plaintiff has not named the proper State agency to effectuate the relief sought.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff has failed to exhaust their administrative remedies with regard to waiver or modification of the State Fire Code. Pursuant to W. Va. Code § 29-3-18, any person aggrieved by an order or decision of the State Fire Marshal based upon or made in the course of administering his duties may appeal that decision to the State Fire Commission. In the matter at hand, no effort whatsoever has been made to allow the State to address Plaintiffs' regulatory concerns. The Court should abstain from hearing Plaintiff's claims until the appropriate State agencies have had an opportunity to address issues presented.

SEVENTH AFFIRMATIVE DEFENSE

Defendant reserves the right to assert any other affirmative defenses, should a good faith basis for such exist or becomes apparent as discovery into this matter progresses.

Respectfully Submitted,

WEST VIRGINIA OFFICE OF THE
STATE FIRE MARSHAL,
Walter Smittle, Fire Marshall

By counsel,

DARRELL V. McGRAW, JR.

ATTORNEY GENERAL

s/ Chad M. Cardinal
CHAD M. CARDINAL
ASSISTANT ATTORNEY GENERAL
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

[Certificate of Service Omitted]

[Case Style Omitted]

DEFENDANTS WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, GRETCHEN O. LEWIS, Secretary; OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION, NANCY L. TYLER, Director; SANDRA L. DAUBMAN, Program Manger, and THE HONORABLE GASTON CAPERTON, Governor, MOTION TO DISMISS

NOW COME the Defendants, the West Virginia Department of Health and Human Resources, Gretchen O. Lewis, Secretary, the Office of Health Facility Licensure and Certification, Nancy Tyler, Director, Sandra L. Daubman, Program Manager, and The Honorable Gaston Caperton, Governor of the State of West Virginia, by counsel, Charlene A. Vaughan, Deputy Attorney General, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and moves this Honorable Court to enter an order dismissing Plaintiff's Complaint for Declaratory and Injunctive Relief and Monetary Damages, with prejudice, because Plaintiff's Complaint fails to state a cause of action upon which relief can be granted against

said defendants. Plaintiffs have failed to state a claim under the American with Disabilities Act or the Fair Housing Act Amendments. Plaintiffs Next of Friends lack capacity to sue on behalf of residents at Buckhannon Homes. Plaintiffs Buckhannon Residential Board and Care and the West Virginia Board and Care Association lack standing to seek relief on behalf of residents in residential bed and care homes. In support of their motion to dismiss, the defendants rely upon the attached memorandum of law.

WHEREFORE, because the Plaintiffs have failed to state a cause of action upon which relief can be granted against each of these Defendants, Defendants pray that this Honorable Court grant their motion to dismiss; enter an order dismissing Plaintiff's Complaint against each of them, with prejudice; and, for such other relief as this Honorable Court deems just and proper.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, GRETCHEN O. LEWIS, OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION, NANCY L. TYLER, and SANDRA L. DAUBMAN

By Counsel

DARRELL V. McGRAW JR.
ATTORNEY GENERAL

s/ Charlene A. Vaughan
CHARLENE A. VAUGHAN
DEPUTY ATTORNEY GENERAL
DEPARTMENT OF HEALTH and
HUMAN RESOURCES

State Capitol Complex
Building 3, Room 210
Charleston, WV 25305
(304) 558-2131

COUNSEL FOR DEFENDANTS
GRETCHEN O. LEWIS,NANCY L.
TYLER, SANDRA L. DAUBMAN, AND
THE HONORABLE GASTON CAPERTON

[Case Style Omitted]

DEFENDANT WEST VIRGINIA FIRE MARSHAL'S OFFICE RENEWED MOTION FOR SUMMARY JUDGMENT IN PART, MOTION TO DISMISS IN PART, and OBJECTIONS to PLAINTIFF'S AMENDED COMPLAINT

In light of Plaintiffs' recently filed amended complaint in the above-styled action, The West Virginia State Fire Marshal's Office, Walter Smittle (hereinafter "Fire Marshal") reaffirms and reincorporates by reference those motions and arguments for dismissal of all Plaintiff's claims for lack of standing and for failure to state a claim, as well as its arguments for summary judgment incorporated by reference and previously submitted in this case. To the extent that Plaintiffs have added new claims, the Fire Marshal Office says as follows:

1. Plaintiff has still failed to allege any adverse action taken by Defendant Fire Marshal. Plaintiff has never sought or requested any modification, waiver or reasonably accommodation under the Fire Code, nor has Plaintiff sought to exercise its state administrative remedies in this regard. As

such, Plaintiff has failed to state a claim that they have been damaged in any way by the operation of the State Fire Code or by actions taken by Defendant State Fire Marshal's Office. Further, Plaintiffs' amended complaint, as to allegations concerning operations of the West Virginia Department of Health and Human Services, Office of Health Facility Licensure and Certification, as well as the operations of the Registered Professional Nursing Board. None of these regulations are promulgated by the State Fire Marshal's Office nor do they relate to the operations of the State Fire Marshal's Office. In the interest of clarity, Fire Marshal would like to point out that they do not consider these allegations touching their office.

2. Fire Marshal's Office incorporates by reference the "A Memorandum of Law in Support of Defendant's West Virginia State Board of Examiners for Registered Professional Nurses, Laura S. Rhodes, Executive Secretary, Renewed Motion For Summary Judgment In Part and Motion to Dismiss In Part In Response to Plaintiffs' Amended Complaint." Filed on January 10, 1997, inasmuch as Title III of the ADA by its very language, only applies to public accommodations and services provided by private entities. As Plaintiffs' allegations concerning the Fire Marshal's Office concern the operation of a state agency, Plaintiffs Title III of the ADA claim must not be accepted.

CONCLUSION

Should the Fire Marshal's motions be denied, we reserve the right to raise the appropriate objections at that time regarding the amended complaint's request for punitive and compensatory damages. Based upon the pleadings thus filed we ask that this Court dismiss all claims against Defendant Fire

Marshal's Office, for no valid or substantive claim has been presented against them.

Respectfully Submitted,
WEST VIRGINIA OFFICE OF THE
STATE FIRE MARSHAL,
WALTER SMITTLE, Fire Marshal

By counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

s/ Chad M. Cardinal
CHAD M. CARDINAL
ASSISTANT ATTORNEY GENERAL
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

[Certificate of Service Omitted]

[Case Style Omitted]

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND MONETARY DAMAGES

INTRODUCTION

1. This complaint seeks declaratory and injunctive relief, and monetary damages, under the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601 et seq.

("FHAAA"), and the ADA of 1990, 42 U.S.C. §§ 12101 et seq. ("ADA"). The subject of the complaint is W. Va. Code §§ 16-5C-1 et seq., 29-3-1, et seq., 30-7-1, et seq. and regulations promulgated thereunder. These provisions narrowly define the class of persons who may live in Residential Board and Care Homes ("RBCHs") in West Virginia, and otherwise sharply limit the circumstances under which individuals with mental and physical disabilities may choose to live together. These provisions, both on their face and as applied to the Plaintiffs in this case, are discriminatory housing practices and violate the FHAAA and the ADA. Plaintiffs seek to enjoin Defendants from applying discriminatory standards to homes with disabled adults which are not applied to other homes.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331 (federal question) and 42 U.S.C. § 3613(a)(1)(A) and 42 U.S.C. § 12133. Venue is proper in the Northern District of West Virginia pursuant to 28 U.S.C. § 1391(b) in that, inter alia, the events and omissions giving rise to Plaintiffs' claims occurred in Upshur County, West Virginia.

PARTIES

3. Plaintiff, Buckhannon Board and Care Home, Inc., ("Buckhannon") is a corporation organized and existing under the laws of the State of West Virginia with its principal place of business at Buckhannon, West Virginia. Buckhannon is an "aggrieved person" within the definition of 42 U.S.C. § 3602 (i) and as used in 42 U.S.C. § 3613(a)(1)(A). Buckhannon is associated with, and provides housing to, persons with handicaps as defined in 42 U.S.C. § 3602(h). Buckhannon provides housing to "qualified individuals with a

disability" as defined in 42 U.S.C. § 12131(2). Buckhannon operates three (3) RBCHs which provide housing and services to elderly people who require some assistance with activities of daily living, but who choose to live in a non-institutional setting. These homes are operated by Shirley Dean and are located at the following addresses: 4 Cleveland Avenue, 79 South Florida Street, and 12 Marion Street, Buckhannon West Virginia, 26201.

4. Plaintiff, Almost Home, Inc. ("Almost Home") is a corporation organized and existing under the laws of the State of West Virginia with its principal place of business at Buckhannon, West Virginia. Almost Home is an "aggrieved person" within the definition of 42 U.S.C. § 3602 (i) and as used in 42 U.S.C. § 3613(a)(1)(A). Almost Home is associated with, and provides housing to, persons with handicaps as defined in 42 U.S.C. § 3602(h). Almost Home provides housing to "qualified individuals with a disability" as defined in 42 U.S.C. § 12131(2). Like Buckhannon, Almost Home operates a RBCH. The home is operated by Sharon Oldecker and is located at 18 High Street, Buckhannon, West Virginia 26201.

5. Plaintiff, Daisy Layman is a resident of Buckhannon. She is over 90 years old, is mentally disabled, and is a person with a "handicap" within the meaning of 42 U.S.C. § 3602(h) and a "qualified individual with a disability" within the meaning of 42 U.S.C. § 12131(2). Because Ms. Layman is unable to understand fully the nature of these legal proceedings, she sues through Faye Byers, as her next friend.

6. Plaintiff, Dorsey Pierce, is also a resident of Buckhannon. She is over 90 years old, is mentally disabled, and is a person with a "handicap" within the meaning of 42 U.S.C. § 3602(h) and a "qualified individual with a disability"

within the meaning of 42 U.S.C. § 12131(2). Because Ms. Pierce is unable to understand fully the nature of these legal proceedings, she sues through Lockie J. Marple, as her next friend.

7. Plaintiff, The West Virginia Residential Board and Care Home Association ("WVRBCA"), represents and is comprised of similarly situated residential board and care homes, more fully identified on Exhibit A, attached hereto. These homes provide accommodation and personal assistance to four (4) to ten (10) persons who are not related to the home owner and are dependent upon the services of others by reason of physical or mental impairment. W Va. Code § 16-5C-2(f).

8. Defendant, West Virginia Department of Health and Human Resources ("HHR") is a Department within the Executive Department of the State of West Virginia. HHR is responsible for overseeing, administering, implementing, and enforcing all laws and developing appropriate procedures regarding health policy. Gretchen O. Lewis is the Secretary of HHR and is sued in her official capacity.

9. The Office of Health Facility Licensure and Certification ("OHFLAC") is an office within HHR that adopts, implements, and enforces regulations for the licensure of Residential Board and Care Homes. Nancy Tyler and Sandra Daubman are, respectively, the Director and Program Manager within OHFLAC. Defendants Tyler and Daubman are sued in their official capacities.

10. Defendant, West Virginia Fire Commission ("Fire Commission"), is the administrative body vested with the authority under the West Virginia Code to promulgate, amend and repeal regulations for safeguarding life and property from

the hazards of fire. John Beaty, II, Joseph J. Bostar, III, Randy Breeden, James W. Fife, Francis A. Guffey, II, Daniel Hess, Gregory Alan Lay, David L. Tolliver, Stephen C. McBee, Bill L. Spencer, Victor Stallard, Jr., J. D. Waggoner, and Kenneth Morgan are the State Fire Commissioners and as such, are authorized to enact and repeal the State Fire Regulations. Defendant Commissioners are sued in their official capacity.

11. Defendant, West Virginia Office of the State Fire Marshal ("Fire Marshal"), is the administrative body vested with the authority under the West Virginia Code to implement and monitor fire safety regulations. Walter Smittle is the State Fire Marshal and as such, is authorized to enforce the State Fire Code and underlying Regulations. Defendant Smittle is sued in his official capacity.

12. Defendant, West Virginia State Board of Examiners for Registered Professional Nurses ("Nursing Board"), is the administrative body vested with the authority to govern the practice of registered professional nursing within the state of West Virginia. Laura S. Rhodes is the Executive Director of the Board of Examiners and as such is authorized to enforce the State Nursing Code and Regulations. Defendant Rhodes is sued in her official capacity.

13. The Defendant, Gaston Caperton is the Governor of the State of West Virginia and as such is responsible for employment decisions in the HHR and for the overall enforcement policy. He is named in his official capacity as Governor of West Virginia.

14. The Defendant, State of West Virginia was established by Presidential Proclamation in 1863 as an independent State.

STATUTORY AND REGULATORY BACKGROUND

Office of Health Facility Licensure and Certification

15. The State has enacted a statutory and regulatory scheme, codified at W. Va. Code §§ 16-5C-1, et seq. and accompanying regulations at West Virginia CSR §§ 64-65-1 et seq., (hereinafter collectively referred to as "Chapter 16"), governing the establishment and operation of group homes for persons with disabilities, known as "residential board and care facilities" ("RBCH").

16. The OHFLAC is responsible for enforcing the requirements of Chapter 16. Pursuant to Chapter 16, the OHFLAC may conduct periodic inspections of facilities licensed under Chapter 16, and may issue Deficiency Correction Orders to RBCHs that are not in compliance with the State's regulations.

17. Buckhannon is licensed by the State under Chapter 16. Up to ten persons, including Plaintiffs Daisy Layman and Dorsey Pierce, live at each of the three homes. Between one and four employees staff each Buckhannon site at all times, providing the residents with assistance in their activities of daily living. Similiarly, Almost Home provides identical services to its residents with up to ten persons at its home.

18. In addition to being licensed under Chapter 16, Buckhannon and Almost Home are required to be in full compliance with the State Fire Safety Code governing RBCHs, W. Va. Code §§ 29-3-1 et seq. and West Virginia CSR §§ 87-1-1 et seq.

19. Under W. Va. Code § 16-5C-2(f), only persons meeting the statutory definition of "self-preservation" are permitted to live in Residential Board and Care Facilities. Pursuant to the Fire Safety Code, West Virginia CSR § 64-65-3.32, "self-preservation" is defined as "the capability of , at least, removing one's physical self from situations involving imminent danger, such as fire."

Fire Code

20. The State has enacted a Statutory and regulatory scheme, codified at W. Va. Code §§ 29-3-1 et seq. and accompanying State Regulations, West Virginia CSR §§ 87-1-1 et seq., (hereinafter collectively referred to as "Chapter 29"), which in general govern fire prevention and control within the State.

21. West Virginia CSR § 87-1-14.7 in part mandates all residents of RBCHs shall be capable of self-preservation. "Self-preservation" is defined as the capability of "removing his or her physical self from situations involving imminent danger, such as fire."

22. Among other things, Chapter 29 also mandates that RBCHs must provide:

a. Electrically supervised fire alarm.
b. Automatic sprinkler system.
c. Hardwired smoke detectors.

23. None of these provisions are required for other residential homes.

Nursing Services under OHFLAC

24. OHFLAC regulations further require RBCHs to arrange for a registered professional nurse to assume responsibility for the oversight of nursing care of residents in need of limited and intermittent nursing care. Specifically the applicable provision requires as follows:

> A residential board and care home which provides limited and intermittent nursing care shall arrange for a registered professional nurse to assume responsibility for the oversight of nursing care and services. The home shall enter into a written agreement with the nurse and the home. Arrangements for nursing services may be made by contract with an individual or a nursing service with a management entity; or the residential board and care home may employ a registered nurse; or the administrator of the home may act in this capacity if he or she is a licensed registered professional nurse. Arrangements with a home care agency providing only direct care does not satisfy the requirements for nursing management oversight of all residents. West Virginia CSR § 64-65-12.1.1
>
> The home shall provide adequate nursing support staff to ensure appropriate nursing care outcomes. Nursing support staff shall be under the supervision of the registered professional nurse who has assumed the overall responsibility for the oversight and care provided to the residents. West Virginia CSR § 64-65-12.1.2

25. The above regulations place additional requirements on RBCHs that are not placed on personal residences. Individuals in personal residences may contract with home health agencies or visiting nursing to provide nursing care in such situations.

26. Residents of RBCHs are generally elderly and eligible and qualified for Medicare. Medicare pays for the health care costs of people over 65, 42 U.S.C. § 1395. Home health services, is one Medicare benefit that provides care to a beneficiary who is confined to his home, under a physician's care, and in need of part-time or intermittent nursing care. Medicare home health services can be furnished by a Medicare certified home health agency.

27. RBCHs are not Medicare certified home health agencies and do not provide home health or nursing services and accordingly, do nor receive any Medicare funding. Residents of RBCHs, like individuals in personal residences, can and do occasionally need limited and intermittent nursing care and can individually contract with a home health agency to provide such services.

Nursing Act

28. The State has enacted as statutory and regulatory scheme codified at W. Va. Code §§ 30-7-1 et seq. and accompanying State regulations, West Virginia CSR §§ 19-10-1.1 et seq. (hereinafter collectively referred to as "Chapter 30" or "Nursing Act") which governs the practice of professional nursing in the State.

29. W. Va. Code § 30-7-1 defines the "practice of Registered Nursing" as:

the performance for compensation of any service requiring substantial specialized judgment and skill based on knowledge and application of principles of nursing derived from the biological, physical and social sciences, such as responsible supervision of a patient requiring skill in observation of symptoms and reactions and the accurate recording of the facts, or the supervision and teaching of other persons with respect so such principles of nursing, or in the administration of medications and treatments as prescribed by a licensed physician or a licensed dentist, or the application of such nursing procedures as involve understanding of cause and effect in order to safeguard life and health of a patient and others. (emphasis added)

30. West Virginia CSR § 19-10-3 provides inter alia:

> 3.10 The registered professional nurse shall delegate to another only those nursing measures which that person is prepared or qualified to perform.
>
> 3.11 The registered professional nurse shall supervise others to whom nursing interventions are delegated.
>
> 3.12 The registered professional nurse shall retain professional accountability for nursing care when delegating nursing interventions.

31. The Nursing Board has interpreted the above provisions to prohibit the administering of any medications, by anyone other than a registered professional nurse.

Similarly Situated Residents and Homes

32. The self preservation provisions of West Virginia CSR §§ 64-65-3.32 and 87-1-14.7 applies to RBCHs with 4 to 10 residents. By definition, RBCHs with 1 to 3 residents are not subject to either Chapter 16 or Chapter 29. The effect has been a drastic increase in the number of unregulated homes with three residents. The number of these homes has increased to approximately 250. Exhibit B.

33. Fraternal organizations are permitted to develop and operate homes and asylums for the care and support of orphans and widows of deceased members, and of disabled and aged members in indigent circumstances. The fraternal operated homes are not subject to Chapters 16 and 29. These homes are self-governed:

> Any such grand lodge desiring to establish a home or asylum shall adopt and prescribe such rules an regulations for the government and control thereof as may be deemed wise by such grand body; and it shall appoint a board of directors, trustees, regents or commissioners, composed of a specified number of persons from its own membership, not fewer than seven nor more than eleven, to serve for definite periods; and any such grand lodge may select for each of such boards two members from the associate branches of the orders, known as Pythian Sisters, Rebekahs, Eastern Star, or other

like organizations, as the case may be. Such board shall have the management and control of the home or asylum for which it is appointed, under the prescribed rules and regulations adopted by said body for the government thereof. Such board of directors, trustees, regents or commissioners shall organize by the election of a president, secretary and treasurer, and , if necessary or expedient, an executive committee, all from its own membership. W. Va. Code §35-3-2.

34. Group residential facilities are subject to different and less stringent regulations than RBCHs. W. Va. Code § 27-17-1 defines a "Group residential facility" as a facility which:

(1) Provides residential services and supervision for individuals who are developmentally disabled or behaviorally disabled; (2) is occupied as a residence by not more than eight individuals who are developmentally disabled and not more than three supervisors, or is occupied as a residence by not more than twelve individuals who are behaviorally disabled and not more than three supervisors; (3) is licensed by the department of health or the department of human services; and (4) complies with the state fire commission for residential facilities.

Group residential facilities are not subject to the requirements of Chapters 16 and 29.

35. Residents who do not qualify under the "self preservation" definition may reside in an RBCH if they are receiving hospice care.

36. The self-preservation clause does not apply to personal residences.

STATE ACTION AND FACTUAL BACKGROUND

Self-Preservation

37. Neither Daisy Layman nor Dorsey Pierce is capable of "self-preservation" within the meaning of Chapters 16 or 29, because neither is independently capable of exiting from a building, following instruction and responding to an alarm. Both are, however, capable of safely exiting with available staff assistance. Similar individuals reside at Almost Home.

38. On January 30, 1996, an inspector from OHFLAC, inspected Buckhannon, and issued a Statement of Deficiency on the grounds that, because of their handicaps, ie their lack of mobility to exit the premises without assistance, they did not meet the definition of "self-preservation."

39. Buckhannon's Plan of Correction was rejected because the residents in question would not be evicted from Buckhannon and transferred to a nursing home. A true and accurate copy of the February 1996 Deficiency Statement and related documents is attached hereto as Exhibit C.

40. A second OHFLAC inspection occurred on September 3, 1996. Buckhannon was again cited for failing to comply with the "self-preservation" rule. Exhibit D.

41. The State Fire Marshal also conducted an investigation of Buckhannon. Buckhannon was cited for failure to meet the Chapter 29 definition of "self-preservation".

42. Following the issuance of the Deficiency Statements, Buckhannon attempted to persuade the Defendants to make reasonable accommodations for Ms. Layman and Ms. Pierce. An exception to the "self-preservation" rule, was permissible in the past, which permitted Ms. Layman and Ms. Pierce to remain at Buckhannon. Specifically, prior to 1996, OHFLAC permitted residents to Waive enforcement of the self-preservation. Attached as Exhibits E & G are copies of such Waivers. The Defendants refused to accommodate Buckhannon's requests for exception.

43. On October 18, 1996, Buckhannon received an Order from OHFLAC to cease operating as a RBCH and to relocate all residents within thirty (30) days. Exhibit F. An identical Order was received on or about October 24, 1996 by Almost Home. Exhibit H.

44. The care provided Daisy Layman and Dorsey Pierce at Buckhannon is well suited to their needs. Neither is in need of expensive nursing care; both require only custodial care. Buckhannon provides an important service by preventing premature institutionalization in accordance with the statutory purpose of Chapter 16, stated as follows:

> It is the policy of this State to encourage and promote the development and utilization of resources to ensure the effective care and treatment of persons who are convalescing or whose physical or mental condition requires them to receive a degree of nursing or related

> health care greater than that necessary for well individuals, but not so acute as to require hospitalization. Such care and treatment requires a living environment for such persons which, to the extent practicable, will approximate a normal home environment. To this end, the guiding principle for administration of the laws of the State is that such persons shall be encouraged and assisted in securing necessary care and treatment in noninstitutional surroundings. In recognition that for many such persons effective care and treatment can only be secured from proprietary, voluntary and governmental nursing homes or personal care homes it is the policy of this State to encourage, promote and require the maintenance of institutions other than hospitals offering nursing or related health care or personal care so as to ensure protection of the rights and dignity of those using the services of such facilities. W. Va. Code § 16-5-C-1 (emphasis added).

45. Moreover, both wish to remain at Buckhannon, and their families want them to remain at Buckhannon. The homes are located near their families and the cost of care is well below that which would be charged by a nursing facility. Further, the homes of Buckhannon and Almost Home are in full compliance with the fire code including, among others, smoke detectors and sprinkler systems, as well as around the clock supervision. All of these factors eliminate any fire safety concerns.

CAUSES OF ACTION

COUNT I
(FHAAA as it relates to "self-preservation")

46. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 45 as though fully set forth herein.

47. The FHAAA prohibits discrimination on the basis of a physical or mental handicap. Section 3604(f)(1) of the Act makes it unlawful [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of :

(a) that buyer or renter;
(b) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
(c) any person associated with that buyer or renter.

48. Similarly, it is unlawful to discriminate against any person in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling because of a handicap of that person." 42 U.S.C. § 3604(f)(2).

49. The FHAA, also makes it unlawful to coerce, intimidate, or retaliate against someone for having exercised rights protected by the FHAA. 42 U.S.C. § 3617. Furthermore, the FHAA requires defendants to make "reasonable accommodations in rules, policies, practices, or services," when such accommodations would enable a person with disabilities to live where he or she chooses. 42 U.S.C. § 3604(f)(3)(B).

50. Plaintiffs, Daisy Layman and Dorsey Pierce, are handicapped persons or persons associated with handicapped persons within the meaning of 42 U.S.C. § 3602(h).

51. By virtue of their definition of "self-preservation," Chapters 16 and 29 effectively prohibit any person with the handicap of dementia from living in a group home. The Chapters also prohibit a person with quadriplegia or heimplesia from living in such a home under most circumstances, as well as adults and children with severe or profound mental retardation or acute mental illness. Moreover, it prohibits individuals suffering from normal degenerative aging ailments from residing in group homes.

52. The Chapters 16 and 29 definition of "self-preservation" is not applied to residents of all group homes or other residences, but is selectively applied to residents of RBCHs housing the elderly.

53. The Defendants have refused to make an exception or accommodation in their regulations which would permit Daisy Layman and Dorsey Pierce to continue living at Buckhannon.

54. Defendants' actions as described above are taken with the intent to discriminate and have the effect of discriminating against persons with handicaps.

55. Defendants' actions as described above have injured and are injuring the Plaintiffs. Buckhannon has expended considerable resources in seeking a modification of the "self-preservation" rule for Daisy Layman and Dorsey Pierce, and if Daisy Layman and Dorsey Pierce are indeed evicted, Buckhannon will suffer a loss of income. Moreover,

the events surrounding the issuance of the Cease and Desist Order have had a demoralizing effect on Buckhannon staff and residents. Plaintiffs Daisy Layman and Dorsey Pierce are being denied their civil rights to live where they wish. Both Daisy Layman and Dorsey Pierce, as well as their families, have experienced significant emotional distress because of the eviction notice, and the possibility that they will be institutionalized.

56. The Chapters 16 and 29 definition of "self-preservation," both on its face and as applied to these Plaintiffs, violates Plaintiffs' rights under the FHAAA, 42 U.S.C. §§ 3604(f) and 3617, by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without handicaps;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their handicaps;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

57. Article VI of the United States Constitution, otherwise known as the Supremacy Clause, provides in pertinent part:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof...shall be the Supreme Law of the Land; and Judges in every State shall be bound thereby, anything in the Constitution of Laws of any State to the contrary notwithstanding.

58. The Chapters 16 and 29 definition of "self preservation" is in violation of the FHAA and is preempted by the FHAA and Article VI, United State Constitution.

COUNT II

(Title II of the ADA as it relates to "self-preservation")

59. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 58 as though fully set forth herein.

60. Title II of the ADA prohibits discrimination on the basis of a disability by a public entity. Section 12132 provides that:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132.

61. Plaintiffs, Daisy Layman and Dorsey Pierce, are qualified individuals with a disability within the meaning of 42 U.S.C. § 12131(2).

62. Article VI of the United States Constitution, otherwise known as the Supremacy clause, provides in pertinent part:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof...shall be the Supreme Law of the Land; and Judges in every State shall be bound

thereby, anything in the Constitution of Laws of any State to the contrary notwithstanding.

63. By virtue of their definition of "self-preservation," Chapters 16 and 29 effectively prohibit any person with the disability of dementia from living in a group home. The Chapters also prohibit a person with quadriplegia or heimplesia from living in such a home under most circumstances, as well as adults and children with severe or profound mental retardation or acute mental illness. Moreover, it prohibits individuals suffering from normal degenerative aging ailments from residing in group homes.

64. The Chapters 16 and 29 definition of "self-preservation" is not applied to residents of all group homes or other residences, but is selectively applied to residents of RBCHs that house the elderly.

65. The Defendants have refused to make an exception or accommodation in their regulations which would permit Daisy Layman and Dorsey Pierce to continue living at Buckhannon.

66. Defendants' actions as described above are taken with the intent to discriminate and have the effect of discriminating against persons with disabilities and the aged.

67. Defendants' actions as described above have injured and are injuring the Plaintiffs. Buckhannon has expended considerable resources in seeking a modification of the "self-preservation" rule for Daisy Layman and Dorsey Pierce, and if Daisy Layman and Dorsey Pierce are indeed evicted, Buckhannon will suffer a loss of income. Moreover, the events surrounding the issuance of the Cease and Desist

Order have had a demoralizing effect on Buckhannon staff and residents. Plaintiffs Daisy Layman and Dorsey Pierce are being denied their civil rights to live where they wish. Both Daisy Layman and Dorsey Pierce, as well as their families, have experienced significant emotional distress because of the eviction notice, and the possibility that they will be institutionalized.

68. The Chapters 16 and 29 definition of "self-preservation", both on its face and as applied to Plaintiffs Daisy Layman and Dorsey Pierce, violates Plaintiff's rights under Title II of the ADA, 42 U.S.C. §12131 and 12132, and the regulations promulgated thereunder, 28 C.F.R. §35.130, by:

(a) denying the Plaintiffs, by reason of their disabilities, the opportunity to participate in or benefit from the services and programs offered by Buckhannon;

(b) subjecting the Plaintiffs, by reason of their disabilities, to discrimination;

(c) denying the Plaintiffs an opportunity to participate in a program in the most integrated setting appropriate to their needs;

(d) imposing and applying eligibility criteria that screen out the Plaintiffs from fully and equally enjoying the services and program offered by Buckhannon;

(e) denying the Plaintiffs an opportunity to participate in or benefit from the services and program offered by Buckhannon that is equal to that of older people without disabilities.

69. The Chapters 16 and 29 definition of "self preservation" is in violation of Title II of the ADA and is preempted by the ADA and Article VI, United States Constitution.

COUNT III

(Title III of the ADA as it relates to "self-preservation")

70. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 69 as though fully set forth herein.

71. Title III of the ADA prohibits discrimination on the basis of a disability by a private entity that operates a public accommodation. Section 12182 provides that:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. 42 U.S.C. § 12182.

72. Plaintiffs, Daisy Layman and Dorsey Pierce, are qualified individuals with a disability within the meaning of 42 U.S.C. § 12102(2).

73. Article VI of the United States Constitution, otherwise known as the Supremacy clause, provides in pertinent part:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof...shall be the Supreme Law of the Land; and Judges in every State shall be bound thereby, anything in the Constitution of Laws of any State to the contrary notwithstanding.

74. By virtue of their definition of "self-preservation," Chapters 16 and 29 effectively prohibit any person with the handicap of dementia from living in a group home. The Chapters also prohibit a person with quadriplegia or heimplesia from living in such a home under most circumstances, as well as adults and children with severe or profound mental retardation or acute mental illness. Moreover, it prohibits individuals suffering from normal degenerative aging ailments from residing in group homes.

75. The Chapters 16 and 29 definition of "self-preservation" is not applied to residents of all group homes or other residences, but is selectively applied to residents of group homes for the elderly.

76. The Defendants have refused to make an exception or accommodation in their regulations which would permit Daisy Layman and Dorsey Pierce to continue living at Buckhannon.

77. Defendants' actions as described above, prevent the Plaintiffs and other similarly situated RBCHS, from providing public accommodations to individuals with disabilities and the State is preventing RBCHs from complying with the provisions of Title III of the ADA and the State's conduct has the effect of discriminating against persons with disabilities and the aged.

78. Defendants' actions as described above have injured and are injuring the Plaintiffs. Buckhannon has expended considerable resources in seeking a modification of the "self-preservation" rule for Daisy Layman and Dorsey Pierce, and if Daisy Layman and Dorsey Pierce are indeed evicted, Buckhannon will suffer a loss of income. Moreover,

the events surrounding the issuance of the Cease and Desist Order have had a demoralizing effect on Buckhannon staff and residents. Plaintiffs Daisy Layman and Dorsey Pierce are being denied their civil rights to live where they wish. Both Daisy Layman and Dorsey Pierce, as well as their families, have experienced significant emotional distress because of the eviction notice, and the possibility that they will be institutionalized.

79. The Chapters 16 and 29 definition of "self-preservation", both on its face and as applied to Plaintiffs Daisy Layman and Dorsey Pierce, violates Plaintiffs' rights under Title III of the ADA, 42 U.S.C. §§ 12181 and 12182, and the regulations promulgated thereunder, 28 C.F.R. §35.130, by:

(a) denying the Plaintiffs, by reason of their disabilities, the opportunity to participate in or benefit from the services and programs offered by Buckhannon;

(b) subjecting the Plaintiffs, by reason of their disabilities, to discrimination;

(c) denying the Plaintiffs an opportunity to participate in a program in the most integrated setting appropriate to their needs;

(d) imposing and applying eligibility criteria that screen out the Plaintiffs from fully and equally enjoying the services and program offered by Buckhannon;

(e) denying the Plaintiffs an opportunity to participate in or benefit from the services and program offered by Buckhannon that is equal to that of older people without disabilities.

80. The Chapters 16 and 29 definition of "self preservation" is in violation of Title III of the ADA and is

preempted by the ADA and Article VI, United States Constitution.

COUNT IV

(FHAAA as it relates to Nursing Services)

81. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 80 as though fully set forth herein.

82. Residents of RBCHs may occasionally need limited and intermittent nursing care as available from home health agencies.

83. By virtue of West Virginia CSR §§ 64-65-12 et seq., they cannot obtain such services unless the RBCH in which they reside hires a registered nurse or contracts with a home care agency to provide oversight in addition to direct care services.

84. The provisions of West Virginia CSR §§ 64-65-12 et seq. violates and is preempted by the FHAAA and Article VI, United States Constitution by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without disabilities;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their disabilities;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

85. West Virginia CSR §§ 64-65-12 et seq. is in violation of the FHAA and is preempted by the FHAA and Article VI, United States Constitution.

COUNT V

(Title II of the ADA as it relates to Nursing Services)

86. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 85 as though fully set forth herein.

87. Residents of RBCHs may occasionally need limited and intermittent nursing care as available from home health agencies.

88. By virtue of West Virginia CSR §§ 64-65-12 et seq., they cannot obtain such services unless the RBCH in which they reside hires a registered nurse or contracts with a home care agency to provide oversight in addition to direct care services.

89. West Virginia CSR §§ 64-65-12 et seq. violates and is preempted by the ADA, and Article VI, United States Constitution by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without disabilities;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their disabilities;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

90. West Virginia CSR §§ 64-65-12 et seq. is in violation of Title II of the ADA and is preempted by the ADA and Article VI, United States Constitution.

COUNT VI

(Title III of the ADA as it relates to Nursing Services)

91. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 90 as though fully set forth herein.

92. Residents of RBCHs may occasionally need limited and intermittent nursing care as available from home health agencies.

93. By virtue of West Virginia CSR §§ 64-65-12 et seq., they cannot obtain such services unless the RBCH in which they reside hires a registered nurse or contracts with a home care agency to provide oversight in addition to direct care services.

94. West Virginia CSR §§ 64-65-12 et seq. violates and is preempted by the ADA, and Article VI, United States Constitution by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without disabilities;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their disabilities;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

95. West Virginia CSR §§ 64-65-12 et seq. is in violation of Title III of the ADA and is preempted by the ADA and Article VI, United States Constitution.

COUNT VII

(FHAAA as it relates to the Nursing Act)

96. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 95 as though fully set forth herein.

97. Plaintiffs, Daisy Layman and Dorsey Pierce, occasionally need assistance with taking medication.

98. By definition of Chapter 30, this can only be done by a registered professional nurse.

99. By virtue of this Chapter 30 effectively prohibits any person with a handicap from residing anywhere other than an institution with skilled nursing care.

100. The Chapter 30 limitation on the administration of medication, both on its face and as applied to Plaintiffs, Daisy Layman and Dorsey Pierce, violates their rights under the FHAAA by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without disabilities;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their disabilities;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

101. The Chapter 30 limitation on medication administration violates the FHAA and is preempted by the FHAA and Article VI, United States Constitution.

COUNT VIII

(Title II of the ADA as it relates to the Nursing Act)

102. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 101 as though fully set forth herein.

103. Plaintiffs, Daisy Layman and Dorsey Pierce, occasionally need assistance with taking medication.

104. By definition of Chapter 30, this can only be done by a registered professional nurse.

105. By virtue of this Chapter 30 effectively prohibits any person with a disability from residing anywhere other than an institution with skilled nursing care.

106. The Chapter 30 limitation on the administration of medication, both on its face and as applied to Plaintiffs Daisy Layman and Dorsey Pierce, violates their rights under Title II of the ADA by:

(a) denying the Plaintiffs, by reason of their disabilities, the opportunity to participate in or benefit from the services and programs offered by Buckhannon;

(b) subjecting the Plaintiffs, by reason of their disabilities, to discrimination;

(c) denying the Plaintiffs as opportunity to participate in a program in the most integrated setting appropriate to their needs;

(d) imposing and applying eligibility criteria that screen out the Plaintiffs from fully and equally enjoying the services and program offered by Buckhannon;

(e) denying the Plaintiffs an opportunity to participate in or benefit from the services and program offered by Buckhannon that is equal to that of older people without disabilities.

107. The Chapter 30 limitation on medication administration violates the ADA and is preempted by Title II of the ADA and Article VI, United States Constitution.

COUNT IX

(Title III of the ADA as it relates to the Nursing Act)

108. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 107 as though fully set forth herein.

109. Plaintiffs, Daisy Layman and Dorsey Pierce, occasionally need assistance with taking medication.

110. By definition of Chapter 30, this can only be done by a registered professional nurse.

111. By virtue of this Chapter 30 effectively prohibits any person with a disability from residing anywhere other than an institution with skilled nursing care.

112. The Chapter 30 limitation on the administration of medication, both on its face and as applied to Plaintiffs Daisy Layman and Dorsey Pierce, violates their rights under Title III of the ADA by:

(a) denying the Plaintiffs, by reason of their disabilities, the opportunity to participate in or benefit from the services and programs offered by Buckhannon;

(b) subjecting the Plaintiffs, by reason of their disabilities, to discrimination;

(c) denying the Plaintiffs as opportunity to participate in a program in the most integrated setting appropriate to their needs;

(d) imposing and applying eligibility criteria that screen out the Plaintiffs from fully and equally enjoying the services and program offered by Buckhannon;

(e) denying the Plaintiffs an opportunity to participate in or benefit from the services and program offered by Buckhannon that is equal to that of older people without disabilities.

113. The Chapter 30 limitation on medication administration violates the ADA and is preempted by Title III of the ADA and Article VI, United States Constitution.

COUNT X

(Discriminatory Treatment of Similarly Situated Homes)

114. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 113 as though fully set forth herein.

115. The State of West Virginia has selectively and arbitrarily enacted and applied onerous laws and regulations governing RBCHs. In contrast, homes and asylums of fraternal orders, group residential facilities, RBCHs with less than 4 residents, and hospice patients residing in RBCHs are all exempted from these same or similar laws and regulations.

116. The Defendants' enactment and application of extensive and onerous laws and regulations of Chapters 16 and 29 to RBCHs, while exempting other similarly situated homes and residents, is arbitrary and capricious and violates equal protection and Due Process guarantees of the Constitutions of the United States and West Virginia.

COUNT XI

(Preliminary and Permanent Injunctive Relief)

117. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 116 as though fully set forth herein.

118. The enforcement of the Cease and Desist Order issued by OHFLAC to Buckhannon on October 18, 1996 and Almost Home on October 24, 1996, and any others issued to similarly situated RBCHs will cause the Plaintiffs irreparable harm for which they have no adequate remedy at law. Such irreparable harm consists of the eviction of thirty residents against their will for which there are no alternatives other than relocation to a nursing home for costs in excess of double those currently incurred by residents of RBCH's. Buckhannon and

other RBCHs and their employees will likewise suffer irreparable harm through loss of income. Such losses are incapable of being determined so as to allow an award of damages as a remedy at law.

119. Plaintiffs fear retaliation by the State of West Virginia, through its Departments, Bureaus, Divisions and officers identified herein, as a result of filing this Complaint. For example, OHFLAC has great latitude and discretion with regard to inspections and enforcement of Chapter 16. The Plaintiff's fear the Defendants may take further action, impose civil penalties or revoke or deny other licenses.

120. Based upon information and belief, some RBCHs declined to join this action because of this fear. Despite the fear of reprisal, the Plaintiffs' have resolved that their homes are in jeopardy and serious risk of closure or insolvency.

121. The harm to the Plaintiff's in the absence of injunctive relief outweighs the potential harm to the Defendants should they prevail on the merits, if injunctive relief is granted by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(a) To enter a Declaratory Judgment that the "self-preservation" definition under Chapter 16 is in violation of and preempted by the FHAAA, 42 U.S.C. §§ 3601 et. seq.; and Title II and III of the ADA, 42 U.S.C. §§ 12101 et. seq.;

(b) To enter a Declaratory Judgment that the "self-preservation" definition under Chapter 29 as it applies to RBCH's, which comply with all Fire Code provisions, W. Va. Code §§ 29-3-1 et seq. and West Virginia CSR § 87-1-14.7, is in violation of and preempted by the FHAAA and Title II and III of the ADA.;

(c) To enter a Declaratory Judgment that the Fire Code requirements of W. Va. Code §§ 39-3-1 et seq. and West Virginia CSR § 87-1-14.7 that specify that an electrically supervised fire alarm, automatic sprinkler system, and hardwired smoke detectors as it applies to RBCH's which do not house individuals incapable of self-preservation is in violation of and preempted by the FHAAA and Title II and III of the ADA;

(d) Preliminarily and permanently enjoin the Defendants, State of West Virginia, HHR, OHFLAC, Fire Commission and Fire Marshal, their agents, and employees, and successors, from enforcing any orders that Daisy Layman and Dorsey Pierce, or other similarly situated residents, be evicted from Buckhannon, and from otherwise enforcing its "self-preservation" rule against Buckhannon, Almost Home or any other RBCH;

(e) To enter a Declaratory Judgment that the Nursing Services requirement of West Virginia CSR §§ 64-65-12.1 et seq. is in violation of and preempted by the FHAAA, 42. U.S.C. §§ 3601 et seq. and Title II and III of the ADA, 42 U.S.C. §§ 12101 et seq.

(f) To enter a Declaratory Judgment that the "administration of medication" limitation of the Nursing Board is overly broad and in violation of and preempted by the

FHAAA, 42 U.S.C., §§ 3601 et seq and Title II and III of the ADA, 42 U.S.C. §§ 12101 et seq;

(g) Preliminarily and permanently enjoin the State of West Virginia, the Governor, HHR, the HHR Secretary, OHFLAC, OHFLAC Director, Nursing Board, the Nursing Board Executive Secretary, including their agents, officers and employees thereof, from taking any action against any participating RBCH until a hearing is held and a decision rendered in this matter.

(h) To enter a Declaratory Judgment that Chapters 16 and 29 insofar as they discriminate against RBCHs by applying different laws and regulations than other similarly situate homes is void as a violation of the United States Constitutional guarantees of Due Process and Equal Protection.

(i) Award appropriate punitive and compensatory damages to the Plaintiffs and against Defendants;

(j) Award the Plaintiffs their costs and reasonable attorneys' fees in this action; and,

(k) Order such other relief as this Court deems just and proper.

BUCKHANNON BOARD AND CARE HOME, INC; ALMOST HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DAISY LAYMAN, by her next friend, FAYE BYERS; DORSEY PIERCE, by her next friend LOCKIE J.

MARPLE, and on behalf of all others similarly situated.

By Counsel

LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, LLP

s/ Webster J. Arceneaux, III
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[Verifications and Exhibits Omitted]

[Style Abbreviated]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

BUCKHANNON BOARD AND CARE HOME, INC., et al.

Plaintiffs,

v. Civil Action No. 2:96CV106 (STAMP)

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, GRETCHEN O. LEWIS, OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION, NANCY TYLER, SANDRA L. DAUBMAN AND GASTON CAPERTON'S MOTION TO DISMISS, DENYING DEFENDANTS WEST VIRGINIA STATE BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES AND LAURA S. RHODES' MOTION FOR SUMMARY JUDGMENT IN PART AND MOTION TO DISMISS IN PART AND DENYING DEFENDANTS WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL AND WALTER SMITTLE'S RENEWED MOTION FOR SUMMARY JUDGMENT IN PART AND MOTION TO DISMISS

I. Procedural History

On October 28, 1996, plaintiffs filed this civil action in this Court, alleging violations of the Americans with Disabilities Act ("ADA") and the Fair Housing Amendments Act ("FHAA"). Plaintiffs sought declaratory and injunctive relief in addition to money damages. On November 18, 1996, defendants West Virginia Department of Health and Human Resources ("HHR"), Gretchen O. Lewis ("Lewis"), Office of Health Facility Licensure and Certification ("OHFLAC"), Nancy Tyler ("Tyler"), Sandra L. Daubman ("Daubman"), and Gaston Caperton ("Caperton") filed a motion to dismiss. On November 22, 1996, defendants West Virginia Office of the State Fire Marshal ("Fire Marshal") and Walter Smittle

("Smittle") joined in that motion. On December 6, 1996, plaintiffs, Buckhannon Board and Care Home, Inc. ("Buckhannon"), the West Virginia Board and Care Home Association ("Association"), Daisy Layman by her next friend Faye Byers, and Dorsey Pierce by her next friend Lockie J. Marple, responded to that motion. On December 16, 1997, defendants the West Virginia State Board of Examiners for Registered Nurses ("Board") and Laura S. Rhodes ("Rhodes") filed a reply to plaintiffs' response. On December 30, 1996, defendants HHR, Lewis, OHFLAC, Tyler, Daubman, and Caperton filed a reply in support of their motion to dismiss.

On November 20, 1996, the Board and Rhodes filed a motion for summary judgment in part and a motion to dismiss in part. On December 30, 1996, plaintiffs filed a motion to amend the complaint. On January 13, 1997, defendants HHR, Caperton, the Board and Rhodes responded to that motion. On that same date, the Fire Marshal and Smittle filed a "Renewed Motion for Summary Judgment In Part and a Motion to Dismiss in Part and Objections to Plaintiff's [sic] Amended Complaint." On January 23, 1997, plaintiffs filed a reply in support of their motion to amend the complaint. On February 2, 1997, this Court granted plaintiffs' motion to amend the complaint and plaintiffs filed the amended complaint.

For the reasons set forth below, this Court finds: (1) defendants' motion to dismiss should be granted in part and denied in part, (2) the motion for summary judgment in part and to dismiss in part filed by the Board and Rhodes should be denied as moot, (3) the motion filed by the Fire Marshal and Smittle for partial summary judgment and their motion for partial dismissal should be denied.

II. Facts

A complete recitation of the facts is not necessary for the resolution of the pending motions. However, the following facts are relevant to the issues raised by the parties. West Virginia Code § 16-5C-1, et seq. and 64 CSR § 65-1, et seq. govern residential board and care homes. Buckhannon operates as a residential board and care home ("RBCH"). The law and regulations require that all RBCH residents possess the ability to remove themselves, physically, from "situations involving imminent danger." 87 CSR § 1-14.7. This ability is called "self-preservation." Id.

On January 4, 1996, Buckhannon applied to OHFLAC for a renewal of their licensure as a RBCH with respect to three homes it operated. On January 30, 1996, OHFLAC conducted an inspection of Buckhannon's facilities and concluded that each home housed residents who were incapable of "self-preservation." As a result, OHFLAC issued statements of deficiency to Buckhannon. On September 3, 1996, OHFLAC conducted a second inspection of the Buckhannon homes and again cited Buckhannon for non-compliance with the fire safety code's requirement that residents of RBCH's be capable of "self-preservation." The State Fire Marshal also inspected the homes and issued a written report in which it reached the same conclusion. On October 18, 1996, OHFLAC ordered Buckhannon to cease operating as a RBCH and to relocate all its residents within 30 days. Subsequently, plaintiffs filed this civil action, alleging that the West Virginia law and the defendants' actions taken pursuant to that law violated the FHAA and the ADA.

III. Motion to Dismiss By HHR, Lewis, OHFLAC, Tyler, Daubman and Caperton -- Granted in part, Denied in part

In assessing a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court must accept the factual allegations contained in the complaint as true. Advanced Health- Care Services, Inc. v. Radford Community Hosp., 910 F.2d 139, 143 (4th Cir. 1990). Dismissal is appropriate pursuant to Rule 12(b)(6) only if "'it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proven in support of its claim.'" Id. at 143-144 (quoting Johnson v. Mueller, 415 F.2d 354, 355 (4th Cir. 1969)).

Stated another way, it has often been said that the purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; it is not a procedure for resolving a contest about the facts or the merits of the case. 5A C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d § 1356, at 294 (1990) (citations omitted). The Rule 12(b)(6) motion also must be distinguished from a motion for summary judgment under Fed. R. Civ. P. 56 which goes to the merits of the claim and is designed to test whether there is a genuine issue of material fact. For purposes of the motion to dismiss, the complaint is construed in the light most favorable to the party making the claim and essentially the court's inquiry is directed to whether the allegations constitute a statement of a claim under Fed. R. Civ. P. 8(a). As many courts have stated, the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. Id. § 1357, at 321. As this district court noted in Williams v. Wheeling Steel Corp., 266 F. Supp. 651, 654 (N.D. W. Va. 1967), "[t]he plaintiff's burden in resisting a motion to dismiss for failure to state a cause of action is a relatively slight one."

A. Fair Housing Amendments Act Claim

Under the FHAA, a plaintiff may establish a claim in two ways. First, a plaintiff may allege facial discrimination, i.e. discriminatory intent/disparate treatment. This claim involves alleging that the challenged statute, regulation, or practice subjects, on its face, an FHAA protected group to "explicitly differential" treatment. Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995). Once a plaintiff has shown such disparate treatment, a prima facie case under the FHAA has been established and the burden shifts to the defendant to justify the discriminatory law, regulation or practice. Larkin v. Michigan Dept. of Social Servs., 89 F.3d 285 (6th Cir. 1996). Second, a plaintiff may allege that an otherwise neutral statute, regulation, or practice has a discriminatory impact upon an FHAA protected group and that the defendant has failed to make a necessary, "reasonable accommodation" to afford the disabled an "equal opportunity to use and enjoy a dwelling." 42 U.S.C § 3604(f)(3)(B); Bryant Woods Inn, Inc. v. Howard Cnty., 124 F.3d 597, 602-03 (4th Cir. 1997); see also Oxford House-C v. St. Louis, 77 F.3d 249 (8th Cir. 1996); Larkin, supra.

This Court has carefully reviewed the plaintiffs' complaint and finds that it establishes a prima facie case under the FHAA for facial discrimination. The relevant West Virginia Code sections and the regulations promulgated thereunder, W. Va. Code § 16-5C-1, et seq. and 64 CSR § 65-1, et seq., apply only to persons residing in convalescent group homes.[1] The purpose behind these laws is stated in W. Va. Code § 16-5C-1. That provision explains that it is the state's purpose to "encourage and promote . . . the effective care and

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[1] All citations to the West Virginia Code and regulations promulgated thereunder refer to the laws in effect prior to 1997.

treatment of persons who are convalescing or whose physical or mental condition requires them to receive a degree of nursing or related health care greater than that necessary for well individuals, but not so acute as to require hospitalization." This purpose shows that Chapter 16 is not generally applicable; thus, it is not facially neutral. "[S]tatutes that single out for regulation group homes for the handicapped are facially discriminatory." Larkin, 89 F.3d at 290. Moreover, "a plaintiff need not prove the malice or discriminatory animus of a defendant to make out a case of intentional discrimination where the defendant expressly treats someone protected by the FHAA in a different manner than others." Bangerter, 46 F.3d at 1501. It is also clear that Chapter 16 applies to an FHAA protected group. Under the FHAA, a person is "handicapped" if he or she has "a physical or mental impairment which substantially limits one or more of [his or her] major life activities." 42 U.S.C. §3602(h).

As noted above, the defendants have moved this Court pursuant to Rule 12(b)(6) to dismiss plaintiffs' claim under the FHAA. Defendants argue that plaintiffs have failed to state an FHAA claim because the statutes and regulations at issue are rationally related to a legitimate government interest. Specifically, defendants argue that the "self-preservation" requirement ensures the safety of other RBCH residents, staff, and firefighters and that such protection is a legitimate government interest. Further, defendants contend that these laws and regulations are a valid exercise of the State of West Virginia's police powers under the Tenth Amendment of the United States Constitution and this Court should dismiss plaintiffs' claim for that reason.

Applying the standards for granting a motion to dismiss as outlined above, this Court finds that defendants' motion as

to the FHAA claim should be denied. Defendants' arguments are inapposite to a motion to dismiss under the FHAA because they concern justifications for the discriminatory laws and regulations. See Bangerter, 46 F.3d at 1502. Such justifications cannot be found within the four corners of plaintiffs' complaint; therefore, they cannot be considered on a motion to dismiss. Accordingly, this Court concludes that the plaintiffs' pleadings are sufficient to withstand defendants' motion to dismiss the FHAA claim of discriminatory intent. Consequently, defendants motion to dismiss plaintiffs' claim for intentional discrimination under the FHAA should be denied.

Plaintiffs also allege a claim under the FHAA based upon the state's alleged failure to provide a "reasonable accommodation" to the laws and regulations which would allow persons unable to self-preserve to nevertheless live in an RBCH. Plaintiffs urge that a written waiver signed by the residents who cannot respond to an alarm and exit without assistance is a reasonable accommodation. Plaintiffs allege that such waivers were allowed in the past and should continue to be accepted so that those not capable of self-preservation could live in an RBCH if they so choose. Defendants argue that such disregard for the fire regulations is not a reasonable accommodation and contravenes the basic purpose of the regulatory scheme that governs convalescent care. Furthermore, according to defendants, such waivers pose a direct threat to the health and safety of other residents, staff, and firefighters. Finally, defendants argue that plaintiffs cannot maintain both a claim for intentional discrimination and a claim for discriminatory impact, citing Bangerter, 46 F.3d 1491.

In Bangerter, the plaintiff challenged a regulation that applied only to group homes for the handicapped. Plaintiff

argued that the regulation was facially discriminatory and that the state had failed to make a reasonable accommodation for the regulation's discriminatory impact. The court held that the plaintiff had made a prima facie case for intentional discrimination under the FHAA and denied the defendant's motion to dismiss that claim. At the same time, the court dismissed plaintiff's discriminatory impact claim, finding that maintaining both claims under the FHAA was "inappropriate" since plaintiff was not challenging an ordinance that was generally applicable. 46 F.3d at 1502.

This Court agrees with the reasoning of the Bangerter court. It is inconsistent and illogical to find on the one hand that a law or regulation is facially discriminatory because it applies only to the handicapped and then find that it is generally applicable but has a discriminatory impact. As explained above, the West Virginia laws and regulations at issue in this matter apply only to a FHAA protected group. They are facially discriminatory. Plaintiffs cannot simultaneously maintain a claim for intentional discrimination and discriminatory impact plus failure to make a reasonable accommodation. Accordingly, defendants' motion to dismiss plaintiffs' discriminatory impact plus failure to make a reasonable accommodation claim should be granted.

B. Americans with Disabilities Act Claim

The Americans With Disabilities Act states: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A "qualified individual with a disability" is one who has a disability, a mental or physical impairment that

substantially limits one or more major life activities, 28 C.F.R. § 35.104, and who

> with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. 42 U.S.C. § 12131(2); 28 C.F.R. § 35.104.

The ADA does not define "services," "programs," or "activities." "Public entity" is defined, in relevant part, to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1); 28 C.F.R. § 35.104.

A public entity discriminates against an ADA protected individual if it "administer[s] a licensing or certification program in a manner" that subjects him or her to differential treatment. Also, a public entity may not "establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(6). Moreover, a public entity must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

In support of their motion to dismiss, defendants argue that plaintiffs are not "qualified individuals with a disability" because there is no service, program or activity being offered for which plaintiffs can qualify. (Mot. to Dis. at 14). Further, defendants argue that residence at a RBCH does not constitute such a service, program, or activity by virtue of the state's application of the fire safety code to the homes. (Id. at 14-15). Additionally, defendants contend that while public entities must make reasonable accommodations to ensure equality of opportunity, the ADA must not be interpreted so as to undermine, or require a "fundamental alteration" in, the licensure and fire safety regulation scheme. (Id. at 18-20). According to defendants, plaintiffs' resolution, waivers of liability signed by residents who cannot self-preserve, is not a reasonable accommodation because the waivers would undermine the fire regulation scheme.

Plaintiffs argue in response that the licensing requirements for RBCH's do fall within the scope of the ADA and that a waiver signed by RBCH residents who are not capable of self-preservation constitutes a "reasonable accommodation" that would bring the State and its agencies into compliance with the ADA. Plaintiffs note that such a waiver system has been used previously and that it applies only to one requirement of the fire safety scheme. This prior use of waivers and their negligible effect on the body of regulations governing fire safety show, according to plaintiffs, that waivers do not constitute a fundamental alteration in the licensure and fire safety codes.

After careful review of the parties' motions and memoranda and the relevant case law, this Court finds that plaintiffs have stated a claim under the ADA. As noted above, a Rule 12(b)(6) motion tests only the sufficiency of a

complaint. Unlike a summary judgment motion, a motion to dismiss limits the court's review to the pleadings; the court is not resolving the merits of the case. Applying this standard, this Court finds that defendants' motion to dismiss the ADA claim should be denied. First, no party contests that defendants qualify as public entities. Second, West Virginia Code Sections 16-5C-2(f), 16-5H-2(f) and the regulations thereunder, 64 CSR §§ 65-3, 3.14 and 87 CSR §§ 1-14, 14.7 apply only to RBCH's and impose requirements not imposed on other facilities that house disabled persons. In this way, they subject the residents and the homes to differential treatment. Finally, for the following reasons, this Court finds that the law and the regulations qualify as an "activity" within the scope of the ADA.

Although it appears that no court has addressed whether fire-safety codes are governed by the ADA, some courts have reviewed other types of permitting and licensing schemes. One court has held that the ADA prohibits local governments from administering zoning permit procedures and licensing schemes in a discriminatory manner. Pack v. Clayton County, 1993 WL 837007 (N.D. Ga. 1993) (citing 28 C.F.R. § 35.130(b)(6)). The Second Circuit has held that "activity" includes refusing a building permit to an organization because its clientele were formerly drug-dependant. Innovative Health Sys., Inc. v. White Plains, 117 F.3d 37, 44-45 (2nd Cir. 1997). This Court finds the rationale of the Innovative decision persuasive and applicable to this civil action.

Innovative Health Systems, Inc. ("IHS") was an outpatient drug and alcohol-rehabilitation treatment center which sought permission from the city of White Plains, New York to relocate its facility to downtown White Plains. Because the new facility would be much larger, IHS's director,

Dr. Ross Fishman, planned to expand the services to include treatment for children of chemically-dependent parents. 117 F.3d at 40. Initially, the Deputy Commissioner of Building for the city told IHS that its proposed use of the downtown building was permissible under the city's zoning laws. Id. at 40-41. Dr. Fishman signed a lease for the space and began paying rent. Subsequently, IHS applied for a building permit to renovate the former retail space into office space. Id. at 41. The application generated "tremendous opposition from the surrounding community," who voiced fears of "jeopardized safety and falling property values" and referred to IHS's clientele as "undesirable elements." Id. at 41, 42, n.3. Nevertheless, the Commissioner decided to grant the permit but his decision was subject to the approval of the Zoning Board. The Board reversed his decision and revoked the permit. Id. at 42. As a result, IHS and five of its clients sued the city and others, alleging that the revocation constituted discrimination and differential treatment based solely on a disability which violated the ADA and the Rehabilitation Act. Id.

The city moved to dismiss, arguing, in part, that zoning decisions do not fall within the scope of the ADA. The Second Circuit rejected that argument, finding unpersuasive the rulings of several district courts which held that the ADA did not apply to zoning decisions.[2] In so finding, the court noted that although the ADA did not define "service, program, or activity," the Rehabilitation Act, which contains a similar prohibition of discrimination, defines "program or activity" as

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[2] See Kessler Inst. for Rehabilitation, Inc. v. Mayor and Council of Essex Falls, 876 F.Supp. 641, 655 (D.N.J. 1995); Robinson v. Friendswood, 890 F.Supp. 616, 620 (S.D.Tex. 1995); Oxford House, Inc. v. Albany, 155 F.R.D. 409, 410-11 (N.D.N.Y. 1994).

"'all of the operations' of specific entities, including 'a department, agency, special purpose district, or other instrumentality of a State or of a local government.'" Id. at 44. (quoting 29 U.S.C. § 794(b)(1)(A) (1994)). The court also recognized, as did the district court, that the plain meaning of "activity" is a "'a natural or normal function or operation.'" Id. (quoting Webster's Third New International Dictionary (1993)). The court concluded that "both the ADA and the Rehabilitation Act clearly encompass zoning decisions by the City because making such decisions is a normal function of a governmental entity." Id. at 44. Additionally, the court found that the legislative history of the ADA shows that Congress intended its prohibitions to apply to all governmental activities of public entities. Id.

Similarly, this Court finds that the ADA encompasses the fire regulation scheme at issue in this civil action because that scheme is a "normal function of a governmental entity." Additionally, although this Court agrees with the Second Circuit's analysis of the ADA's legislative history, this Court finds that resort to that history is neither necessary nor appropriate because the statutory language is unambiguous. See Matala v. Consolidation Coal Co., 647 F.2d 427, 430 (4th Cir. 1981) (explaining "[w]e look to the legislative history in construing a statute only if the meaning of a statute is unclear." United States v. Oregon, 366 U.S. 643, 648 (1961)). Like the Second Circuit, this Court finds that the language of Title II's discrimination provision "prohibits all discrimination by a public entity, regardless of context . . . ." Id. at 44-45. Finally, this Court finds that the rationale of the Innovative decision comports with the plain language of the regulations promulgated under the ADA which clearly state that a public entity may not administer a licensing program in a discriminatory manner. 28 C.F.R. § 35.130(b)(6).

Accordingly, defendants' motion to dismiss plaintiffs' claim under the ADA should be denied.

This Court declines to rule on defendants' argument that a waiver does not constitute a reasonable modification to the fire regulation scheme for the same reasons that this Court declined to rule on the issue with respect to plaintiffs' FHAA claims. Such arguments test the merits of the complaint as opposed to its sufficiency and are properly considered on a motion pursuant to Rule 56.

C. Capacity and Ripeness Defects

Defendants assert that neither the next friends nor the Association possess the capacity to sue on behalf of the named residents, Daisy Layman and Dorsey Pierce. Defendants argue that before the next friends may bring suit on behalf of the residents, the residents must be adjudicated incompetent by a West Virginia state court. Defendants assert that the lack of a guardian for either resident shows that neither one has been adjudicated incompetent because West Virginia Code § 44A-2-1 would require such an appointment. Defendants base this argument upon Fed. R. Civ. P. 17(b) & (c).

In response, plaintiffs argue that "there is no dispute" that Ms. Pierce is incompetent as a result of her dementia; thus, it is "prudent" for her to sue through a next friend. (Resp. Br. at 22). Plaintiffs also explain that Ms. Layman sues through a next friend because of her inability to attend court proceedings, but that she would be willing to proceed in her own name. Further, plaintiffs argue that this Court possesses the power, without regard to state law, to appoint guardians for these individuals pursuant to Fed. R. Civ. P. 17(c) because it is a procedural rule and not a substantive rule.

This Court agrees with defendants. "The district court's power to appoint under Rule 17(c) should not be used to circumvent the mandate in Rule 17(b) to observe state law." Wolfe by Hedges v. Bias, 601 F. Supp. 426, 427-28 (S.D. W. Va. 1984) (citing 6 C. Wright & A. Miller, Federal Practice and Procedure, § 1571 (1971)). West Virginia law provides for the appointment of guardians and/or conservators for the incompetent. W. Va. Code § 44A-1-1, et seq. (1994). As the court in Wolf, supra, noted, that process includes an evidentiary hearing, the appointment of counsel for the alleged incompetent, and now it requires an evaluation report by a licensed physician or psychologist.[3] Like the Wolf court, this Court will not circumvent that process. At the same time, this Court finds it inappropriate to dismiss this action on this ground because the impropriety of suing by next of friend does not affect the elements of the claims alleged in the complaint. Accordingly, this Curt finds that defendants' motion to dismiss for lack of capacity should be denied. Additionally, this Court finds it appropriate to direct plaintiffs to substitute the real parties in interest in lieu of the inappropriately named next friends.

D. Lack of Standing

Defendants also assert that the next friends and the association lack standing to seek relief that would adversely impact other residents in Buckhannon facilities. Defendants

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[3] At the time of the Wolf decision, the appointment of guardians for the incompetent was governed by West Virginia Code § 27-11-1, et seq, which the court notes required "at least a supportive affidavit by a duly licensed physician" in addition to the evidentiary hearing and appointment of counsel. 601 F. Supp. at 428.

argue that the waivers sought by plaintiffs operate to nullify the fire safety scheme; thus, as plaintiffs seek relief for all Buckhannon facilities in the form of waivers, they are pursuing a judgment that endangers those residents who are not before the Court and who are protected by the fire regulations. Defendants cite no law in support of this position. Plaintiffs did not address this argument in their response.

This Court has already addressed the next friends' capacity to sue. With respect to the Association, this Court finds that defendants' argument lacks merit. In Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977), the Supreme Court set forth the requirements of associational standing. An association may seek prospective judicial relief on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claims asserted, nor the relief requested, requires the participation of the individual members in the lawsuit.

Here, the residents would have standing to sue in their own right. To show standing under Article III, the residents must establish: (1) they suffered actual or threatened injury, (2) the conditioned complained of caused the injury or threatened injury and (3) the requested relief redressed the alleged injury. See e.g. Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990). The residents' non-ambulatory status prevents them from remaining at a RBCH; the current fire regulations are the cause of this injury; and the requested relief, a waiver, would redress this injury because it would allow them to remain at their RBCH. Thus, the first requirement for associational standing has been met. The purpose of a RBCH is to house people who can no longer care for themselves; hence, the Association seeks

protection of its interest in extending care to such people regardless of their ambulatory status and in doing so satisfies the second criteria for associational standing. Finally, the participation of the individual residents is not required because neither the ADA nor the FHAA claims require individualized proof. For the foregoing reasons, this Court finds that the Association has standing to sue the defendants. Accordingly, defendants' motion to dismiss for lack of standing should be denied.

E. Exhaustion of Administrative Remedies

At the time defendants filed this motion, the matter was pending before an administrative law judge with a hearing scheduled for November 15, 1996. Defendants argued, based on this fact, that plaintiffs had not exhausted their administrative remedies and that this action should be dismissed for that reason. In response, plaintiffs asserted that the FHAA permits instituting a civil action in the district court without exhaustion of administrative remedies.

On February 11, 1998, this Court asked counsel in this action to advise it of the status of that proceeding. Counsel informed this Court that the administrative law judge has rendered an opinion, that plaintiffs have appealed the decision to the appropriate circuit court in West Virginia and that the action has been stayed, by mutual agreement, pending this Court's resolution of plaintiffs' claims. Accordingly, this Court finds that defendants' motion to dismiss for failure to exhaust administrative remedies should be denied.

IV. Motion For Summary Judgment in Part and to Dismiss in Part by West Virginia State Board of Examiners for Registered Nurses and Rhodes -- Denied as Moot

On November 20, 1996, the Board and Rhodes filed a motion for summary judgment in part and a motion to dismiss in part. On December 12, 1997, the parties stipulated to the dismissal of both the West Virginia State Board of Examiners for Registered Nurses and Laura S. Rhodes, Executive Director. Accordingly, the above-mentioned motions should be denied as moot.

V. Renewed Motion for Summary Judgment in Part and Motion to Dismiss in Part by West Virginia Office of State Fire Marshal and Smittle -- Denied

On January 13, 1997, the Fire Marshal and Smittle filed a "renewed" motion for summary judgment and a motion to dismiss. After reviewing that document, this Court finds that the motions should be denied for the following reasons. First, the motion for summary judgment appears, as far as this Court can discern, to be made by incorporation of the Board and Rhodes' motion for summary judgment. With respect to the Fire Marshal and Smittle, this Court cannot determine by the motion the extent to which the Board's motion applies to these defendants, and these defendants have not argued with any particularity. Moreover, these defendants have not complied with the local rule governing summary judgment motions, LR 7.2, which requires a supporting memorandum and other documents upon which the Rule 56 motion relies. For these reasons, the motion for summary judgment should be denied.

These defendants move to dismiss the amended complaint with respect to themselves on the ground that plaintiffs have "failed to allege any adverse action taken by Defendant Fire Marshal." (Renewed Mot. at 2). Additionally, these defendants state that plaintiffs have not sought any modification of the fire code nor have plaintiffs exhausted their

administrative remedies. This Court has addressed exhaustion of remedies. As to these defendants' other assertions, this Court finds that plaintiffs' complaint, to the extent that it seeks injunctive relief from enforcement of the fire code, asserts claims against the Fire Marshal and Smittle that are sufficient to survive a Rule 12(b)(6) motion. Accordingly, defendants Fire Marshal and Smittle's renewed motion to dismiss should be denied.

These defendants also move to dismiss (or for summary judgment) plaintiffs' claims made pursuant to Title III of the ADA. They make this motion by incorporating a memorandum defendants state was entitled "A Memorandum of Law in Support of Defendant's [sic] West Virginia State Board of Examiners for Registered Professional Nurses, Laura S. Rhodes, Executive Secretary, Renewed Motion for Summary Judgment in part and Motion to Dismiss in Part in Response to Plaintiffs' Amended Complaint." Such a document was never filed with this Court. Because these arguments are not before this Court, defendants' motion to dismiss plaintiffs' Title III ADA claims should be denied.

VI. Conclusion

First, because this Court finds that plaintiffs have stated a claim for facial discrimination under the FHAA and for discrimination under the ADA, defendants' motion to dismiss for failure to sufficiently allege these claims is DENIED. Second, because this Court finds that plaintiffs cannot consistently maintain a claim for facial discrimination and discriminatory impact, defendants' motion to dismiss the discriminatory impact claim is GRANTED. Third, defendants' motion to dismiss for lack of capacity to sue is DENIED and plaintiffs are **DIRECTED to substitute the real parties in**

interest in lieu of the inappropriately named next friends within ten (10) days following the entry of this order. Fourth, because this Court finds that the West Virginia Residential Board and Care Home Association has associational standing, defendants' motion to dismiss for lack of standing is DENIED. Next, because this Court finds no reason to dismiss for failure to exhaust administrative remedies, defendants' motion to dismiss on that ground is DENIED.

Additionally, because the Board and Laura S. Rhodes are no longer defendants in this action, their motion for summary judgment in part and to dismiss in part are DENIED as MOOT. Finally, the motions to dismiss and for summary judgment made by the Fire Marshal and Walter Smittle are DENIED for the reasons set forth above.

IT IS SO ORDERED.

The Clerk is directed to transmit copies of this order to counsel of record herein.

ENTERED: February 18, 1998

s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

[This Exhibit was attached to Defendants' Motion to Stay, which is Omitted]

Senate Bill No. 627

ARTICLE 5H. RESIDENTIAL BOARD AND CARE HOMES

§16-5H-1. Purpose.

It is the policy of this state to encourage and promote the development and utilization of resources to ensure the effective care and treatment of persons who are dependent upon the services of others by reason of physical or mental impairment or who may require limited and intermittent nursing care, ~~but who are capable of self-preservation and are not bedfast~~, including those individuals who qualify for and are receiving services coordinated by a licensed hospice. Such care and treatment requires a living environment for such persons which, to the extent practicable, will approximate a normal home environment. To this end, the guiding principle for administration of the laws of the state is that such persons shall be encouraged and assisted in securing necessary care and treatment in noninstitutional surroundings. In recognition that for many such persons effective care and treatment can only be secured from proprietary and voluntary residential board and care homes, it is the policy of this state to encourage, promote and require the maintenance of residential board and care homes so as to ensure protection of the rights and dignity of those using the services of such residential board and care homes.

The provisions of this article are hereby declared to be remedial and shall be liberally construed to effectuate its purposes and intents.

§16-5H-2. Definitions.

(j) "Residential board and care home" means any residence or place or any part or unit thereof, however, named, in this state which is advertised, offered, maintained or operated by the ownership or management, whether for a consideration or not, for the express or implied purpose of providing accommodations, personal assistance and supervision, for a period of more than twenty-four hours, to four or more persons who are dependent upon the services of others by reason of physical or mental impairment or who may require limited and intermittent nursing care, ~~but who are capable of self-preservation, as certified in consultation with a licensed health care professional, and are not bedfast~~ including those individuals who qualify for and are receiving services coordinated by a licensed hospice: *Provided*, That services utilizing equipment which requires auxiliary electrical power in the event of a power failure may not be used unless the residential board and care home has a backup power generator: *Provided*, however, That the care or treatment in a household, whether for compensation or not, of any person related by blood or marriage, within the degree of consanguinity of second cousin to the head of the household, or his or her spouse, may not be deemed to constitute a residential board and care home within the meaning of this article. Nothing contained in this article applies to hospitals, as defined under section one, article five-b of this chapter; or state institutions, as defined under section three, article one, chapter twenty-five of this code or section six, article one, chapter twenty-seven of this code; or residential board and care homes operated by the federal

government or the state government or institutions operated for the treatment and care of alcoholic patients; or offices of physicians; or hotels, boarding homes or other similar places that furnish to their guests only room and board; or to homes or asylums operated by fraternal orders pursuant to article three, chapter thirty-five of this code;

~~(l) "Self-preservation" means that a person is, at least, capable of removing his or her physical self from situations involving imminent danger, such as fire; and~~

[Case Style Omitted]

MOTION TO DISMISS

Comes now Walter Smittle State Fire Marshal by counsel and moves this Court to Dismiss the above-styled action for the following reasons:

1. The above-styled civil action has been rendered moot by action of the West Virginia Legislature who amended the relevant fire code and statutory provisions.

2. Dismissal is appropriate when the controversy presented for review has become moot. Karder v. May, 484 U.S. 72, 82, 83, 109 S. Ct. 388, 98 L. Ed. 2d 327 (1987).

WHEREFORE, for the above reasons and those contained in the attached Memorandum of Law, defendant Smittle now does humbly pray that he be DISMISSED from the above-styled civil action.

Respectfully Submitted,

WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL, WALTER SMITTLE,
Fire Marshal,
By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

s/ Chad M. Cardinal
CHAD M. CARDINAL (Bar # 6016)
ASSISTANT ATTORNEY GENERAL
State Capitol, Room E-26
Charleston, West Virginia 25305

[Case Style Omitted]

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

Come now Plaintiffs and move this Court, pursuant to Rule 54(d)(2) of the Federal Rules of Civil Procedure, for attorneys' fees. In support of such motion, Plaintiffs respectfully state as follows:

1. Both the Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C. 3601, et seq. and the Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 1233, provide that a court has the discretion to grant a prevailing party a reasonable attorney's fee, including expert fees, as part of the costs of litigation.

2. As discussed in detail in the supporting affidavit filed by Webster J. Arceneaux, III and the Memorandum of

Law in Support of Plaintiffs' Motion for Attorneys' Fees, Plaintiffs are prevailing parties in the instant matter, and as such are entitled to attorneys fees and costs under the FHAA and the ADA against all of the Defendants in the amount of $ 120,744.65.

3. Alternatively, the District Court also has inherent authority to award attorneys fees to a party when an opposing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.

4. As Plaintiffs fully have explained in the supporting affidavit of Webster J. Arceneaux, III and the Memorandum of Law in Support of Plaintiffs' Motion for Attorneys' Fees, Defendants State Fire Marshal and State Fire Commission have acted in bad faith as well as vexatiously in the litigation of the instant matter. Accordingly, Plaintiffs are alternatively entitled to an award of attorneys' fees and expenses from March 11, 1997 to the present against the Defendants State Fire Marshal and State Fire Commission in the amount of $57,483.76.

WHEREFORE, Plaintiffs respectfully request that, the Court grant Plaintiffs' Motion for Attorneys' Fees on the basis that the Plaintiffs are prevailing parties in the instant matter against all Defendants in the amount of $120, 744.65. In the alternative, Plaintiffs request that the Court sanction Defendants State Fire Marshal and State Fire Commission for their bad faith conduct in the course of this litigation by requiring said Defendants to pay Plaintiffs' attorneys' fees from March 11, 1997 to the present in the amount of $ 57,483.76.

BUCKHANNON BOARD AND CARE HOME, INC; ALMOST HOME, INC. THE WEST VIRGINIA RESIDENTIAL BOARD

AND CARE HOME ASSOCIATION; DAISY LAYMAN, by her next friend, FAYE BYERS; DORSEY PIERCE, by her next friend LOCKIE J. MARPLE, and on behalf of all others similarly situated,

By Counsel,

LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, LLP

s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III (State Bar I.D. # 155)
Sandra K. Henson (State Bar I.D. # 6329)
Post Office Box 1746
Charleston, West Virginia 25326
(304) 345-2000

[Certificate of Service and Exhibits Omitted]

[Case Style Omitted]

WEBSTER J. ARCENEAUX, III'S AFFIDAVIT IN SUPPORT OF MOTION FOR ATTORNEYS FEES AND EXPENSES

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, To-wit:

I, Webster J. Arceneaux, III, being first duly sworn upon my oath, hereby come forth and state as follows:

1. I received my Doctor of Jurisprudence degree from the West Virginia University College of Law in 1980. I became a member of the West Virginia Bar in that year.

2. I am also a member of the U. S. District Courts for the Northern and Southern Districts of West Virginia and have been admitted to practice before the Fourth and Sixth Courts of Appeals.

3. Between 1980 and the present, the undersigned has held the following positions:

1980-1981	Law Clerk to Justice Thomas B. Miller
1981-1982	Associate, Kaufman & Ratliff
1982-1985	Counsel and then General Counsel, District 17, United Mine Workers of America
1985-1986	Deputy Attorney General, Environment and Energy Division
1986-1990	Associate, McIntyre Haviland & Jordan
1990-	Associate and then, as of 1993, Partner, Lewis, Friedberg, Glasser, Casey & Rollins

4. Through eighteen years of legal practice, the undersigned has developed substantial experience in federal court litigation related to constitutional and discrimination matters, including claims under the ADA.

5. I have previously been awarded attorneys fees in a variety of cases before the West Virginia Supreme Court, the Circuit Courts of West Virginia, and the West Virginia Human Rights Commission. In WVEA v. The Consolidated Public Retirement Board, Civil Action No. 89-Misc-18, Judge

A. Andrew MacQueen awarded my client WVEA attorneys fees for my legal work in the amount of $180.00 per hour in 1996. The attorneys fees award was subsequently vacated by agreement of the parties upon an agreement by the State to settle the matter and pay the attorneys fees in full at the rate of $180.00 an hour. A hearing examiner for the West Virginia Human Rights Commission also awarded me this year an attorneys fee award at the hourly rate of $180.00 in Deitz v. WV Department of Public Safety, Docket Number: ES-149-93A. That case is presently on appeal to the Human Rights Commission.

6. Attached hereto is an itemized list of the time myself and my associates and paralegals spent on this matter and an itemization of the expenses incurred.

7. I believe the hourly rates for myself, for my associates and for my paralegals is well within the range of what other counsel have been awarded in the state of West Virginia for similar legal services and is therefore a fair and reasonable rate for the litigation of this case.

8. In preparing this affidavit, I reviewed this firm's time entries, and I deleted from the bill all time related to the dismissed claim against the WV Board of Nursing Examiners; all time related to the State appeal of the OHFLAC administrative hearings; and, all time that appeared to be improperly on the bill. The original bills and the modifications are attached hereto.

9. On February 27, 1997, I received a copy of the District Court of the Northern District of Georgia's recent opinion in Baggett, et al. v. Baird, et al., 1997 WL 151544 (N.D. Ga. 1997).

10. On March 11, 1997, I provided a copy of said opinion to Richard Yurko who had recently been designated as counsel for the majority of the Defendants including OHFLAC and the State Fire Marshal. At that time, I asked Mr. Yurko if he thought the Defendants would be interested in settling and he was advised that the State Fire Marshal was definitely unwilling to settle this matter and that it would have to be resolved by the Courts. Thereafter, the parties never discussed settlement again.

11. I did not learn of the legislative activity related to the amendments to the State Fire Code until February 24, 1998, after completing the briefs accompanying their summary judgment motion and receipt of the Court's ruling on the Motion To Dismiss. It is significant to note that I only learned of this legislative activity after one of my clients was tipped off by an agent of the State Fire Marshal's office. I was shocked by this development and I called Richard Yurko, counsel for the Defendants, on February 24, 1998, who likewise was surprised to learn that the State Fire Marshal had promulgated amendments to the State Fire Code which were before the Legislature.

12. Mr. Yurko later called me to confirm the State Fire Code amendments and to advise that OHFLAC likewise had introduced a bill to amend W. Va. Code § 16-5H-2(j) by removing the term self-preservation.

13. Had Defendants State Fire Marshal and State Fire Commission informed me of their willingness or intent to amend the Fire Code and to eliminate the self-preservation regulations on the date of the Smittle deposition, March 11, 1997, the instant matter could have been stayed or may have

been resolved without my having to incur significant time and expenses between March 11, 1997, and the present.

s/Webster J. Arceneaux, III
Webster J. Arceneaux, III
(State Bar ID No. 155)
LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, LLP
Post Office Box 1746
Charleston, West Virginia 25326

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA

Signed and sworn before me this 4th day of June, 1998, by Webster J. Arceneaux, III.

My commission expires November 19, 2004

s/ Geraldine S. Strickland
Notary Public

[Exhibits Omitted]

[Case Style Omitted]

RESPONSE TO MOTION FOR ATTORNEY FEES

Comes now Walter Smittle State Fire Marshal, by and through counsel, Chad M. Cardinal, Assistant Attorney General to reply to Motion for Attorney Fees as follows:

I.
BACKGROUND

The above-styled action has been rendered moot. Not by any action of Plaintiff's counsel, nor through any influence of the Court, but rather by the political law making processes.

The State Fire Code was amended by the State Fire Commissioner after several open public meetings, all of which were advertised in the State Register and following the receipt of written comments. The Fire Code then progressed to the State Legislature's Rule making Committee, and again was the topic of public debate and subject to the Committees' vote. The Rule then became part of a bill and progressed to the full House and Senate for vote, and then to the Governor for signature.

There is nothing in the record to indicate, nor is it alleged that this political process was corrupted by Plaintiffs. Nothing indicates that the motivations of the Senators, Representatives, Committee members, Fire Commissioners, Fire Marshal, nor the Governor was in anyway influenced by pending litigation. In fact, it is unclear that any of the voting parties even knew of the existence of an unresolved lawsuit, which at that time was being defended by insurance counsel.[1]

II.
ARGUMENT

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[1]The Board of Risk Management did not perceive the case as against the State herself, but rather against the insurance policy. It was only after the case was rendered moot by legislative action that Plaintiff stipulated they no longer sought compensatory damages.

a. Plaintiff is not a "Prevailing Party" for the purposes of an award of attorney fees.

The question for review is whether Plaintiffs are entitled to attorney fees as a prevailing party.

In Farrar v. Hobby, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992), the Supreme Court provided the applicable standard:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff."

Farrar, at 111, 113 S. Ct. at 573 (internal citations omitted), The United States Court of Appeals for the Fourth Circuit interpreted Farrar's requirement in S-1 By and Through P-1 v. State Bd. of Educ. of North Carolina, 6 F.3d 160 (4th Cir. 1993)(Wilkinson, J., dissenting), vacated, 21 F.3d 49, 51 (4th Cir.) (en banc)(adopting Judge Wilkinson's dissent as the majority opinion), cert. denied, 513 U.S. 876, 115 S. Ct. 205, 130 L.Ed.2d 135 (1994). There the "catalyst theory" was specifically rejected and cases such as Bonnes v. Long, 599

F.2d 1316 (4th Cir. 1979), which applied that standard were overruled.

The Court clearly articulated the determinative factors:

> [1] 1. A person may not be a "prevailing party" plaintiff under 42 U.S.C. Sec. 1988 except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought in a Sec. 1983 action. Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).
>
> [2] 2. The fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party. "catalyst theory," allowing that result, is no longer available for that purpose, see Farrar, 506 U.S. at 103, 113 S.Ct. at 573-74, and cases such as Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), which applied that theory, are overruled. S-1 and S-2, 21 F.3d at 51.

The Court concluded that the determinative factor is whether "material alteration of the legal relationship between the parties" as manifested by whether the plaintiff was entitled to enforce 'a judgment, consent degree, or settlement against the defendant S-1 By and Through P-1, 6 F.3d at 168-69 (Quoting Farrar, 506 U.S. at 113, 113 S.Ct. at 574).; Statewide Reapportionment Advisory Committee v. Beasley, 99 F.3d 134 (4th Cir. 1996) cert. denied, ___ U.S. ___, 117 S. Ct. 1427, 137 L. Ed.2d 536 (1997). Applying the holdings of S-1, S-2, Farrar,

and Statewide to the matter at hand, Plaintiffs do not meet the definition of "Prevailing Party."

The above matter was rendered moot by a change in legislation. The current litigation in no way altered the relationship of the parties, nor did it provide any form of enforceable decree. The claim simply vanished due to actions of the Political Process.[2] As such, Plaintiff is not a "Prevailing Party" and not entitled to an award of attorney fees.

III.

b. Plaintiff fails to establish a claim for Attorney Fees or sanctions based upon bad faith.

Plaintiff's counsel admits that the proposed changes to the Fire Code were the result of a series of open meetings, of the Fire Commission and State Legislature. All were noticed in the State Register. (Exhibit No. 1.) The proposed changes and meetings were advertised in every state newspaper, television and radio station. (Exhibit No. 2.) Nothing was secret. Plaintiff counsel had constructive knowledge of the proposed changes. The Fire Commission & Fire Marshal proposed the changes in a public way, as required by law. West Virginia Code § 29A-1-1 et seq. There is nothing more legally or morally required.

Plaintiff's counsel relies on Square Construction Co. v. Washington Metropolitan Area Transit Authority, 800 F.2d 1256 (4th Cir. 1986) to support the proposition that the

[2]It is note worthy that Plaintiffs did not file any written comments on the proposed code changes, nor did they attend any Fire Commission meetings.

deliberate withholding of relevant documents can give rise to sanctions. That fact pattern is easily distinguishable from the matter at hand. At bar, the proposed legislation was in the thoroughly public rule making process. Not only was Plaintiff's counsel provided the same notice as every other citizen of this State, but he also shared their opportunity to provide written comments, and attend the open meetings. W. Va. Code § 29A-1-1 et seq.

Though it is true that Plaintiff's counsel was not specifically invited, (such solicitation of input from a particular interest group is problematic, see State ex rel. White v. Parsons, 483 S.E.2d 1, (WV 1996), he was afforded opportunities far different and greater than in those cases where documents are concealed for nefarious purposes. There simply is not factual underpinning to support the claim.

It is far to tenuous to sanction Defendants' claims, for it was Plaintiffs' attorney who failed to stay informed of current events. No claim of fraud, deceit, or bad faith can survive the simple fact that Plaintiffs had constructive knowledge of Defendants action. Plaintiff makes it clear that Defendants' then counsel, Richard Yorko, did nothing wrong.[3] Defendants, Fire Marshal, and Fire Commissioner obviously never considered their actions in amending the Fire Code as part of the pending litigation, so much so, that they never even discussed the new legislation with defense counsel.

Finally it is interesting to note that when Defendants' counsel became cognitive of the proposed Fire Code changes, Defendants moved to stay the proceedings. Plaintiffs opposed

[3]At worst there was a lack of communication between the Fire Marshal and counsel.

that motion. It is not clear that had Plaintiff's counsel read the State Register, or attended the advertised Fire Commission meetings, he would have proceeded any differently. Plaintiff has failed to establish Defendants acted in bad faith, or attempted in any way to unnecessarily prolong the litigation. Sanctions against the State are obviously not warranted.

CONCLUSION

Plaintiff is not entitled to an award of Attorney Fees, for the 4th Circuit rejects the "catalyst theory," and no enforceable settlement, judgment, or consent decree evolved from this litigation. Finally, the Attorney cannot reasonably assert bad-faith by the State when nothing was concealed, all was made public in such a way that Plaintiffs could have actually participated in a meaningful way, had they elected to do so.

WHEREFORE, Defendant now does humbly pray that this Court deny Plaintiff's claim of attorney fees and sanctions.

Respectfully Submitted,
West Virginia State Fire Marshal,
Walter Smittle, Fire Marshal,
Defendant,
By counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

s/ Chad M. Cardinal
CHAD M. CARDINAL (Bar # 6016)
ASSISTANT ATTORNEY GENERAL
State Capitol, Room E-26
Charleston, West Virginia 25305

[Certificate of Service Omitted]

[Case Style Omitted]

DEFENDANT, DEPARTMENT OF HEALTH AND HUMAN RESOURCES RESPONSE TO PLAINTIFF'S MOTION FOR ATTORNEY FEES

PLAINTIFFS ARE NOT PREVAILING PARTES IN THIS MATTER AND ARE NOT ENTITLED TO ATTORNEY FEES.

The essential issue presented by plaintiff's Motion for Attorney Fees is whether following dismissal of an action under 42 U.S.C. §§3601 *et seq.* and 42 U.S.C. §§ 12132 and 12182 as moot, the plaintiffs may still be found to be prevailing parties by virtue of pre-judgment events and therefore entitled to an award of attorney fees. The defendants think not.

The plaintiffs acknowledge early on in their Memorandum in Support of their Motion for Attorneys Fees argument that the Fourth Circuit Court of Appeals, in S-1 and S-2 v. State Board of Education of North Carolina, 21 F3d 49 (4th Cir.), cert. denied, 115 S.Ct. 205 (1994) and Statewide Reapportionment Advisory Committee v. Beasley, 99 F.3d 134 (4th Cir. 1996), has declared that the catalyst theory is no longer available to litigants in fee shifting cases. Yet they would have this Court set aside those holdings *sua sponte* and ignore the rule of *stare decisis*. Defendants respectfully submit that this district court does not have discretion to disregard the controlling precedent of the Fourth Circuit Court of Appeals,

and any argument for reconsideration of such Court of Appeals decision is for Court of Appeals. Smith v. Allen-Bradley Co., et al., 371 F.Supp. 698 at 701 (W.D.Va. 1974).

In S-1 and S-2, *supra*, the United States Court of Appeals, Fourth Circuit has adopted the dissenting opinion of Judge Wilkinson from its previous S-1 and S-2 case, 6 F.3d 160 (1993), and has ruled that "a person may not be a "prevailing party" plaintiff under § 1988 except by virtue of having obtained enforceable judgment, consent decree, or settlement giving some of the legal relief sought in the § 1983 action, citing Farrar v. Hobby, 506 U.S.103, 113 S.Ct. 566 (1992)." The Fourth Circuit also ruled that "The fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party. "Catalyst theory," allowing that result, is no longer available for that purpose, see Farrar, 506 U.S. at —, 113 S.Ct. at 573-74, and cases such as Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), which applied that theory, are overruled." Id. at p. 51. Defendants submit that there has been no enforceable judgement or comparable relief through a consent decree or settlement which would qualify plaintiffs as a prevailing party. Farrar v. Hobby, 113 S.Ct. 566 at 573 (1992). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affect] the behavior of the defendant toward the plaintiff." Id. at 11, 113 S.Ct. at 573 (internal citations omitted). Defendants further submit that plaintiffs were not the catalyst for amendments to the W.Va. Code relative to self-preservation, but rather, they had been considering the deletion of the self-preservation requirement prior to the initiation of this lawsuit. And, if this case is mooted, how can it still be a catalyst for change and for the recovery of attorney's fees?

In Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 793-93, 109 S.Ct. 1486, 1493 (1989), the U.S. Supreme Court has stated that "the lawsuit must materially alter the "legal relationship" between plaintiffs and defendants". Farrar, *supra* clearly states that "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." Id. 506 U.S. at ----, 113 S.Ct. at 574. Further, Farrar clarifies the Court ruling in Hewitt v. Helms, 482 U.S. 755, 107 S.Ct. 2672 (1987), in which the Court stressed that a voluntary change in conduct must be formalized in a legally enforceable settlement agreement to transform a plaintiff into a prevailing party for purposes of a § 1983 action. The Department of Health and Human Resources has caused the deletion of self-preservation from its statute. It is argued that because of the deletion of statutory authority to enforce the self-preservation requirement, the Department lacks authority to enforce the regulation which still remains. It is further argued that the Department should not be penalized for making voluntary changes in its statute, and its voluntary change in conduct should not be "a license to shake down government officials," or "a relief Act for lawyers." Farrar, 506 U.S. at —, 113 S.Ct. at 578.

Defendants submit that the Farrar, Texas State Teachers' Ass'n, and Hewitt, and S-1 and S-2, *supra*, decisions also apply to determinations of prevailing party status under 42 U.S.C. §§ 12205 and 3612, and based on that caselaw, plaintiffs are not prevailing parties in this action and are not entitled to attorneys' fees from defendant, Department of Health and Human Resources.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,

Defendants,
By Counsel,

DARRELL V. MCGRAW JR.
ATTORNEY GENERAL

s/ Charlene A. Vaughan
CHARLENE A. VAUGHAN
DEPUTY ATTORNEY GENERAL
DEPARTMENT OF HEALTH
and HUMAN RESOURCES
State Capitol Complex
Building 3, Room 210
Charleston, WV 25305
Bar ID 3855
(304) 558-2131
[Certificate of Service Omitted]

[Case Style Abbreviated]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

BUCKHANNON BOARD AND CARE
HOME, INC., et al.

Plaintiffs,

v. Civil Action No. 2:96CV106
(STAMP)

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES, et al.

MEMORANDUM OPINION AND ORDER GRANTING MOTION FOR RULE 11 SANCTIONS AND IMPOSING SANCTIONS

I. Introduction

This civil action arose, in part, out of plaintiffs' allegations that defendants violated the Americans with Disabilities Act ("ADA") and the Fair Housing Amendments Act ("FHAA"). In the original complaint, plaintiffs sought declaratory and injunctive relief in addition to money damages. Subsequently, plaintiffs relinquished their claims for compensatory damages and pursued only equitable relief. At the time plaintiffs filed the complaint, West Virginia Code § 16-5C-1, et seq. and 64 CSR § 65-1, et. seq. required that all Residential Board and Care Home ("RBCH") residents be capable of "self-preservation," which meant that each resident be able to remove, physically, himself or herself from "situations involving imminent danger." 87 CSR § 1-14-7. Plaintiffs sought a declaration from this Court that the "self-preservation" requirement violated the ADA and the FHAA.

On March 14, 1998, the West Virginia Legislature enacted Senate Bill No. 627 which amended the West Virginia Code by deleting the "self-preservation" requirement. On January 29, 1999, this Court entered a Memorandum Opinion and Order dismissing this civil action, finding that the amendment mooted plaintiffs' claims. At the same time, this Court issued an order to defendants Walter Smittle, the West Virginia Office of the State Fire Marshal, and the West Virginia State Fire Commission ("defendants") to show cause as to why they were not in violation of Federal Rule of Civil Procedure 11, after this Court learned that they were aware of the amendment process that resulted in the deletion of the "self-

preservation" requirement, aware that the proposed amendment was progressing successfully at several stages which took place during the pendency of this litigation but failed to inform plaintiffs, this Court, and even their own counsel of the proposed change. In its order to show cause, in accordance with Fed. R. Civ. P. 11(c)(1)(B), this Court described the conduct it found to be a potential violation of the rule and gave defendants an opportunity to respond.

On February 17, 1999, defendants filed a memorandum in response to the order to show cause. On February 23, 1999, plaintiffs filed a motion for sanctions pursuant to Rule 11 and a memorandum in support of the motion and in response to defendants' show cause memorandum.[1]

For the reasons set forth below, this Court finds that plaintiffs' motion for Rule 11 sanctions should be granted and that defendants should be sanctioned for their failure to disclose the amendment they were seeking in light of their knowledge that the proposed amendment was being approved at several stages of the process by which it was ultimately enacted as a part of Senate Bill No. 627.

II. Discussion

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[1] In the January 29, 1999 Order, this Court denied a motion for attorneys' fees previously filed by plaintiffs. The motion was made pursuant to Fed. R. Civ. P. 54(d)(2) and was premised on two theories: that plaintiffs were prevailing parties under the FHAA, 42 U.S.C. § 3601, et seq., and the ADA, 42 U.S.C. § 1233 et seq. or that the bad faith doctrine entitled plaintiffs to an award of fees. This Court denied the motion finding that defendants' conduct did not rise, or sink, to the level of bad faith, vexatious, wanton or oppressive conduct.

Rule 11 reads, in pertinent part:

> If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties . . . . A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. . . . the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

Fed. R. Civ. P. 11(c)(2)(emphasis added).

The plain language of the rule makes clear that the imposition of sanctions is discretionary and that any sanctions imposed should be fashioned as narrowly as possible to deter the improper conduct as opposed to effecting a fee-shifting. See e.g., Orlett v. Cincinnati Microwave, Inc., 954 F.2d 414, 419 (6th Cir. 1992) (finding that deterrence rather than compensation is the primary goal of Rule 11). Moreover, this Court notes that the rule states that an award of attorneys' fees and costs is appropriate only upon motion by a party. Consequently, while this Court is powerless to order such fees on its sua sponte order to show cause under Rule 11, this Court can impose such fees in granting plaintiffs' motion under Rule 11.

In support of the motion for Rule 11 sanctions, plaintiffs seek payment of attorneys' fees and costs incurred from the date of defendant Smittle's deposition through the date of filing for plaintiffs' response to the motion to dismiss by the defendants which this Court granted in the January 29, 1999 Order; that amount equals $57,483.76 in fees and $4,972.52 in costs. Alternatively, plaintiffs seek an award in the amount of $3,252.00 -- fees and expenses incurred in bringing the Rule 11 motion. Plaintiffs argue that defendant Smittle initiated and was instrumental in achieving the deletion of the "self-preservation" requirement from West Virginia law governing RBCH's. Moreover, the State Fire Marshal and the State Fire Commission were aware of the proposed changes to the law as well, according to plaintiffs. The defendants' failure to inform plaintiffs, this Court, and even their own counsel, according to plaintiffs, permitted the filing of a false affidavit by Smittle and permitted defendants' counsel to defend this action on the basis of unsupported contentions that the defendants' believed the "self-preservation" requirement was a proper exercise of the State's police power over the health and safety of its citizens. Such conduct, assert plaintiffs, should be sanctioned in accordance with the effort, time and expense that could have be avoided through a stay had the parties only known of the potential deletion of the "self-preservation" requirement.

In response to the order to show cause, the defendants maintain that their conduct is excusable because it was "inadvertent error" and the result of a lack of communication between counsel and defendants. (Mem. Resp. Order to Show Cause at 1). Additionally, defendants state that they were "simply not aware that the . . . revisions . . had an impact" on this litigation, suggesting that they merely propose amendments and it is the Legislature and the Legislative Rule Making Committee who approve amendments. Id. Also, the

defendants state that they are "contrite" and that a "rather stern lecture" given them by their counsel have had a greater impact than any monetary sanction could. Id. at 6. This Court disagrees.

This Court finds that as a state agency and an officer of a state agency, defendants should have been aware of the nature of this litigation. Further, because the "self-preservation" requirement was the root of this case, that defendants could not have known that its deletion would affect this litigation is doubtful, at best. Although this Court appreciates defendants' apology to the extent that one was given in the response to show cause, this Court finds that sanctions are warranted here. The parties were put to significant effort and expense in this case. At the same time, this Court recognizes that the primary purpose of Rule 11 is to deter and not to compensate and that the Rule directs courts to sanction narrowly to fit the offending conduct. In the light of these principles, this Court finds the following sanctions appropriate:

1. This Court finds the defendants' conduct worthy of reprimand. The failure to inform plaintiffs, this Court, and their own counsel of actions they took that could have saved a great deal of time, expense, and judicial resources was inexcusable.

2. Defendants are DIRECTED to pay to plaintiffs attorney's fees and costs in the amount of $3,252.00 within 10 days of the entry of this order.

IT IS SO ORDERED.

The Clerk is directed to transmit copies of this order to counsel of record herein.

ENTERED: April 21, 1999

s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE